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THE EUROPEANIZATION OF VISA POLICY: A TRANSFER OF SOVEREIGNTY SHAPED BY ENLARGEMENT

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INTRODUCTION

1. Background

The nature and size of the borders of the European Union changed radically with the enlargements of 2004 and 2007. Since the enlargement of the Schengen area in December 2007, nine of the new Member States now form part of the area without border controls, whose new external land border extends over ten thousand kilometres.

Apart from its length, the new border has other notable characteristics. Whereas previously the EU bordered on countries with which it had a special relationship (in the form of Europe agreements or the EEA area), it now has nine neighbours with whom it has no formal, structural links. There are different forms of cooperation between the EU and Morocco, Russia, Belarus, Ukraine, Turkey and the Balkan countries, but for most of these countries this cooperation cannot be qualified as a 'special relationship.' For all but Turkey and the Western Balkans it is without the prospect of membership offered by the Europe agreements.

While some of the new neighbours have no special relationship with the EU, a number of them have had (and still have) special relationships with the new EU Member States.[1] One manifestation of this was the accumulation of pre-enlargement special rules on border controls and visa regulations enjoyed by the new Member States prior to accession. For example, Poland had visa-free travel with Ukraine; Hungary had the same for Yugoslavia and Ukraine.[2]

Upon accession to the EU, all these special visa arrangements had to be abandoned by the new Member States and replaced by the visa policy rules of the European Union. The latter originate in the Schengen inter-governmental accord which, by abolishing

[1] The basis for these special relationships differs from case to case. Cross border national minorities constitute one reason, but economic issues, such as the importance of local cross border trade also play a role.

[2] See chapter 7 for more details on this.

checks at the EU's internal borders, was considered in need of 'flanking' measures and a gradual harmonization of the rules relating to external border controls.

It is not the first such extension of the application of EU visa rules. The Schengen agreement itself changed from the original 5 to 15 members after the most recent expansion in 2007. What has also changed is the level of deviation permitted to the countries joining the agreement. In all previous cases, because of the intergovernmental nature of the agreements, the country that joined could have its special position appreciated, namely through the acknowledgement of the declarations and special rules in existence before accession.

The new enlargement rules, however, required unconditional acceptance of the Schengen *acquis*, and with this all visa-related rules were subject only to unconditional acceptance. Each acceding state had to adopt all Schengen rules and apply most of them as of the date of accession. This situation clearly had the potential to create tensions across the external borders of the EU, where previously visa-free travel was replaced by the much stricter Schengen visa rules.

The difficulties faced by the new Member States in the visa policy field are symptomatic of a wider problem affecting the external relations of both the Member States and the EU, namely the problem of the transfer of regulatory powers to the European level, and the effect this has on the special relationships of individual Member States with third countries. The issue arose at the very start of the European integration project in relation to the former colonies of Member States. In the process of trying to resolve the tension between the national external policy priorities and loyalty to the Community, the original Member States were successful in transforming their bilateral special relations into Community ones.

Two main paths to Europeanization developed in parallel – the intergovernmental one and the Community one. The intergovernmental path culminated in the Schengen cooperation, whose rules on visas will be studied in detail. The Community path of Europeanization includes cooperation in the visa field as developed under Maastricht. And ultimately both paths merged into one in the Amsterdam Treaty, where visa policy rules are clearly situated in the Community pillar but the substance of the rules

themselves is based on the results achieved in the framework of the Schengen cooperation.

Usually, the Europeanization of a certain policy field occurs when there are important economic, social or other conditions that make regulation at a higher level of governance, in this case the European one, more efficient. The move towards an area without internal frontiers inevitably led to a quest for cooperation, and even to the harmonization of an increasing number of visa policy elements.

We might expect to see similar forces at play as this same policy is Europeanized. However, to adopt the same logic at the European level of regulation would be misleading. Not least because it would assume that the factors determining the policy choices at national level have the same meaning across Europe, which is not the case. While the full communitarization of, say, the common commercial policy means that the factors linked to international trade have a similar meaning everywhere in the EU, a regionally concentrated phenomenon like tourism, for example, may entail different considerations in Italy and in Luxembourg. A similar but increased divergence of interests can be observed when other policy issues are concerned. It is particularly noticeable in the case of cultural links. While both Spain and the United Kingdom have a wide range of countries with which they have strong cultural and linguistic links, the list of those countries is different and one can imagine the difficulties involved in merging diverse cultural concerns into a common, European, one. The same is true if we take immigration concerns as a key factor determining visa policy. Immigration fears are influenced by a variety of factors, one of which is the specific economic situation of a country. Thus, when different EU states face different economic challenges, their attitudes towards immigration vary. At one point in time Spain might see advantage in attracting immigrants to work in Spain while Germany might seek to limit their numbers, and this situation is likely to change over time.

The lack of commonality among EU Member States in the factors determining visa policy engenders a rather complicated system of interactions when it comes to making policy choices and adopting legal acts. Thus, in the visa field, the policy ‘compass’is in fact pointing to three spheres at once. In the first sphere, policy choices are made at national level depending on the national conditions at the time. In the second sphere,

Member States negotiate among themselves to achieve a common understanding/meaning of the factors at European level. And finally, in the third sphere, the compass inclines to where there is interplay between the Member States and the supranational institutions, in order to determine the most appropriate regulation level.

The complexity of the policy-making process as described above leads to certain particularities in the Europeanization of the visa field, and also goes some way towards explaining the choices made in law-making.

More than any other body of EU regulation, visa policy rules have been created as a result of a bottom-up approach to European law-making. The EU rules on visas are not the result of a general principle agreed in the founding Treaties, whose meaning was clarified through Court rulings and whose application eventually culminated in a piece of secondary legislation, as, for example, in the field of equality between the sexes. Instead, EU visa rules are the culmination of decades of work outside the EU structures. To understand these rules it is not enough to study the rules themselves but also the processes linked to their adoption and implementation. In the visa policy field, more than in any other, the process is what counts, for the process reveals the search for a balance between the national and supranational; between freedom and security.

2. Aims and objectives

The core subject of this thesis is European visa policy and the transfer of sovereignty, competences and regulatory powers, formerly from the Member States to the European Community and then to the European Union. It considers the changes to relations with third states that such a transfer entails and the difficulty Member States face in transforming their special bilateral relations into special relations between the Community and third states.

Why visa policy? Visa policy has four distinctive characteristics that make it particularly suitable as a case study for the transfer of sovereignty from Member State to the European level. These include the importance of the visa in the exercise of

territorial sovereignty, its pivotal role in the area of freedom, security and justice, its importance in relation to the whole process of accession and its particular symbolic value. All these aspects will be explored in the following chapters.

Visa and territorial sovereignty

Visas are at the core of territorial sovereignty and the right of each state to decide whom to admit to its territory. This decision is very much influenced by the foreign policy and internal security considerations that are specific to each state and depend on the geographic, political and economic position of that state. The transfer of sovereignty in this field transforms a bi-polar relationship between two states into a tri-polar one, by adding the Community to the mix. In this new configuration tension can build on all three axes as the states try on the one hand to reconcile their special relationships with third states, their loyalty to the Community and on the other, to transform this special relationship into one between the Community and the third state. Such tensions can be observed throughout the communitarization process of visa policy since the Maastricht Treaty, but they have always been met with the possibility of flexible arrangements.

Visas and the area of freedom, security and justice

The issue of visas was the first one within the area of freedom, security and justice to be communitarized (parts of it are already in the Maastricht treaty) and thus present an interesting case study of the stages through which the transfer of sovereignty has passed.

Visas and enlargement

Schengen acquis (of which visa *acquis* is part) presents a particular challenge to the Member States that joined in 2004 and 2007, as it is one of only two fields (together with the EMU) that requires unconditional acceptance and allows for no transitional arrangements. This fact somewhat intensifies the shock of the transfer of sovereignty in such a sensitive field for the new Member States. Unlike the EU-15, for the new Member States the transfer occurred all at once on the accession date (partially smoothed by the two-stage Schengen integration), thus depriving them of the possibility of a gradual transfer stretching over a decade.

Visas and cultural differences

Visas are among the issues that reveal a significant cultural difference between the former EU-15 and the 10 countries from the former Soviet space that joined in 2004 and 2007 (EU-10).[3] This cultural difference is grounded in two issues of considerable symbolic and political significance: borders and the free movement of persons. For the 'old' EU-15, visas were only a technical issue of little concern to the general public or the political elite. Most of the EU-15 enjoyed some form of free movement among themselves over the last 50 years, and whenever their citizens needed to obtain a visa, it was essentially a bureaucratic process involving no affront to their dignity. Due to the Iron Curtain, until the late 1980s there was no need for and no possibility of operating 'friendly' borders.

By contrast, visas constitute a highly sensitive and symbolic issue for the EU-10. Having lived under totalitarian regimes where any movement (even relocation from one town to another) required the prior permission of the authorities and leaving the country was subject to an exit visa, the populations of the EU-10 consider visas as an instrument of control that undermines the free movement principle; a cherished achievement of democracy. Moreover, most of these populations have personal experience of being subjected to humiliating visa procedures from supposedly friendly countries.[4] This historical context explains the reluctance of the EU-10 to subject their neighbours to such procedures. Moreover, due to the post WWII state-building in Eastern Europe, most borders cut through minorities and ethnic groupings, so the sealing of borders through the implementation of Schengen rules is not an attractive proposition to the EU-10[5] countries.

[3] Cyprus and Malta are not included in this group.

[4] E. JILEVA, "Stabilizing the East while keeping out the Easterners: internal and external security logics in conflict", in S. LAVENEX AND E. M. UÇARER (eds.) *Migration and the externalities of European integration*, Lexington Books (Oxford, 2002). For the experiences of the new neighbours (Ukraine, Russia, Belarus) subjected to visa requirements, see Visa Policies of the European Union Member States — Monitoring Report, Stefan Batory Foundation (Warsaw, 2006) which is is based on the extensive survey of those applying for visas in the Consulates of certain EU Member States in Belarus, Moldova, Russia, and the Ukraine. The Report presents a comparative review of visa policies followed by certain Schengen States as well as non-Schengen States that are soon to join the group of the former (Latvia, the Czech Republic and Poland). The report is available at: http://www.batory.org.pl/english/intl/pub.htm

[5] For more details see Chapter 7.

Existing research on visa policy is rather fragmented. There is only one English language study dedicated exclusively to visa policy and it is authored by Annalisa Meloni,[6] focusing on the principle of consistency between the three pillars and its application in the visa field. Visas are also covered as a side issue by a few comprehensive studies on Justice and Home Affairs law[7] or European migration policy,[8] where visa policy and its development are studied in the context of the respective general field. The remaining research can be divided into two groups: one, focusing on the consequences for the individual of the development of European visa policy and the other on the difficulties linked to enlargement. The first group includes works by Elspeth Guild, Richard Cholewinski and others, and addresses the issue of the individual rights of third country and EU nationals in relation to visa policy, free movement rules and data protection. The second group includes numerous policy papers by research institutes throughout Europe, which are highly focused on problems faced by a particular country before or after enlargement and the adoption of European visa rules.

The present work builds upon the existing literature. Its focus is on European visa policy and its institutional and policy setting, placing the dynamics of visa policy development in the context of transfer of sovereignty, competences and external relations law. The aim is to study, from a legal point of view, the tensions arising between the Community loyalty of the Member States and their own foreign policy priorities during the process of the transfer of sovereignty in the field of visa policy. The study compares the vertical shift of sovereignty that occurs when a field is Europeanized for the first time to the horizontal shift occurring with the accession to the EU and the effect such a shift has on special relationships with third states.

The main research questions this study attempts to answer are:

- How do the Member States react to the transfer of sovereignty in the visa policy field?
- What legal tools do they use to release the tensions resulting from this transfer?

[6] A. MELONI, *Visa Policy within the European Union Structure*, Springer, (Berlin, 2006).

[7] S. PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford University Press, (Oxford, 2006).

[8] G. PAPAGIANNI, *Institutional and Policy dynamics in the European Migration Law*, Martinus Nijhoff Publishers, (Leiden, 2006); and FUNGUEIRINO-LORENZO R., *Visa-, Asyl- und Einwanderungspolitik vor und nach dem Amsterdamer Vertrag*, Peter Lang, (Frankfurt, 2002).

- To what extent are Member States successful in transforming their special relationships with third states into a Community special relationship with the same third state?
- To what extent have the 2004 and 2007 enlargements influenced the development of a common visa policy?
- What happens when third countries are not willing to recognize the internal transfer of sovereignty (reciprocity)?
- How is the compatibility of existing individual Member State obligations with the newly communitarised visa policy achieved?

3. Method and organization of the study

To realize this research objective the analysis is organized along three lines: transfer of sovereignty; accession; and relations of the EU with third countries - depending on whether the analysis is conducted from the position of the EU or from the position of the acceding state. Each provides a different perspective on the issues under investigation.

The transfer of sovereignty angle allows for a detailed analysis of the gradual movement of the regulation of more and more visa-related issues from the national to the European level. Studying the treaty provisions and the secondary legislation adopted on the basis of these provisions, as well as the exceptions and flexible provisions negotiated by some Member States, will allow the identification of the tensions caused by this process, the legal reaction to these tensions and the legal instruments chosen to resolve them.

The accession line allows the same phenomenon to be studied from a different perspective. In effect accession is a form of transfer of sovereignty in itself but it has certain temporal and substantial differences to the classic transfer that might occur internally. The accessions of 2004 and 2007 will be the basis for the analysis, as those are the first that occur after the full communitarization of visa policy. The tensions inherent in this process will be identified and compared to those identified in the previous part of the study. Potential differences and similarities will be explored.

Throughout, the term 'Europeanization' is used to refer to both the development of EU levels in the visa field[9] and to the top-down influence from the EU level to national systems, in particular the adoption of the *acquis* in the accession process of new Member States.

The shift of visa policy to the European level occurred in several phases which will be analyzed consecutively here. This particularity determines the method used to study the Europeanization of visa policy here. The method used in this study is thus akin to a journey. At each stage of this journey, the aim is to identify which part of visa policy regulation (as identified at national level) has been moved to a higher level of regulation, what the reasons were for this move and what alternative arguments were put against this proposal. The result will be a reverse pyramid showing how more and more of the elements determining visa policy come under the EU umbrella. Such an exercise is necessary because it will reveal the most sensitive areas for the Member States as regards the transfer of sovereignty in such a contentious field as visa policy. These points of contention might be expected to emerge for the acceding Member States once they encounter the EU system of visa rules. Their problems may well be similar to those of the 'old' Member States in the Europeanization process, and thus the solutions to these problems might find their precedent in previous experiences.

The research for this thesis was completed in November 2009 and reflects the law in force on 30 November 2009. The innovations introduced by the Treaty of Lisbon and other relevant developments adopted until March 2010 are also incorporated whenever relevant. With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon. However, this was not the case beforehand. This is why this study

[9] See RISSE, COWLES, AND CAPORASO (eds.), *Transforming Europe: Europeanization and domestic change*, Cornell University Press, (Ithaca, 2001), where Europeanization is defined as: "the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem solving that formalize interactions among the actors, and of policy networks specializing in the creation of authoritative European rules".

refers to ‘Community Law’ and makes, a distinction between the Community and the Union wherever this was appropriate under the pre-Lisbon legal framework

4. Outline of the thesis

This study is composed of ten chapters. Chapters 1 and 2 set the theoretical framework for the analysis.

Chapter 1 starts with a definition of the concept of the visa and covers the theoretical and historical developments of this concept and then concentrates on visa policy issues at national level. The focus is on the policy functions of the visa, the factors influencing policy formation and the implementation of visa policy. By analyzing this implementation, it defines the elements that are crucial for the exercise of territorial sovereignty. It also provides some quantitative evidence on the importance of different types of visa in the European context.

Chapter 2 provides a concise overview of current legal thinking on the three themes that run through the entire study: the transfer of sovereignty, accession and relations of the European Union with third countries. It is not an attempt to engage in a debate on legal theory but rather serves to introduce the main concepts behind the terminology used throughout the rest of the study.

Chapters 3 to 6 follow the process of the vertical Europeanization of visa policy, namely the transfer of regulatory powers on different aspects of visa policy to European level, and analyze the responses of the states involved in the process to the loss of sovereignty in this field at each step.

Specifically, Chapter 3 follows the intergovernmental cooperation on visas in Europe. The chapter starts by looking at three regional initiatives involving a limited number of countries, namely the Benelux travel area, the Nordic Passport Union and the free travel area between the United Kingdom and Ireland. This is followed by a study of several initiatives that prepared the ground for Schengen. These initiatives, outside the EC framework but involving Member States, were the idea of a passport union, popularized in the mid-1970s and various intergovernmental working groups

formed on issues related to freedom of movement, which were mostly active in the 1980s. The main body of the chapter focuses on the most elaborate example of regional intergovernmental cooperation on visas: the Schengen area.

Chapter 4 identifies the conditions under which special arrangements, based on national concerns linked to visas, were allowed in the intergovernmental period of the Schengen cooperation. It analyzes the accessions to the Schengen Convention that took place before the final incorporation of the Schengen *acquis* into EU Law. It then looks at the relationship between the 'insiders' (Schengen Member States) and 'outsiders' (states acceding to Schengen) and how this relationship changed to accommodate the special links with third countries. The cases of the accession of Portugal and Spain to the Schengen Convention are studied in this context.

Chapter 5 analyzes the legal basis for visa policy in the Treaties. It starts with a brief description of how visas appeared for the first time in the Maastricht Treaty and then goes on to detail the more complete provisions in the Amsterdam Treaty. It also provides an analysis of the differentiation in the field under Amsterdam in the Schengen area, the willing outsiders (Norway, Iceland and later Switzerland) and the reluctant insiders (Denmark, Ireland and the UK). Finally, this chapter summarizes the legal and institutional developments post-Amsterdam: the Vienna Plan, Tampere and The Hague programmes.

Chapter 6 looks at another case of flexible application of the rules outlined in Chapter 5, in order to accommodate the special concerns of one Member State. The case of Greece is studied in this context, because prior to the Eastern Enlargement it was the only Schengen state with two specificities that became much more widespread after the Eastern enlargement. Namely, Greece shared land borders only with third countries that were on the Schengen and later the EU visa 'black' list, and it also had a sizeable national minority in one of its neighbouring countries: Albania.

Chapters 7 to 9 move to the second type of Europeanization, as experienced by the states that acceded to the EU in 2004 and 2007, and study the reactions of both the new Member States and the EU to the process of transfer of sovereignty in the visa field. However, this time the transfer is abrupt and takes place at the accession date, as

opposed to the gradual Europeanization in the visa field experienced by the old Member States.

Chapter 7 looks at how the Member States that joined the EU after the entry into force of the Amsterdam Treaty reacted to the requirement to transfer part of their sovereignty in the visa field. It starts with a brief description of the legal framework for the accession process, which required compulsory Schengen integration as part of the *acquis*. The candidate countries thus had to accept that the various derogations, opt-outs and opt-ins of some of the old member countries were not available to them. The chapter then traces the various steps from membership negotiations to full Schengen membership, with the lifting of internal border controls. Based on this, the chapter then analyzes the reasons for the difficulties and tensions that arose in this context.

Chapter 8 analyzes the impact of enlargement at EU level and the EU reaction to the new Member States' concerns. It considers three specific tools developed in response to enlargement: (i) special travel documents for Kaliningrad, ii) special rules for local border traffic and iii) visa facilitation. It thus documents the fragmentation of the legal space that resulted from the attempt by the EU to take into account the concerns of the new Member States.

Chapter 9 looks further at the impact of enlargement on the EU level but this time focuses on a measure with more horizontal than geographical effect, namely the principle of reciprocity. This chapter first traces the genesis of reciprocity in EU visa policy. Against this background, it analyzes two issues in particular: i) the extent to which the Eastern enlargement influenced the introduction and development of the reciprocity mechanism in the framework of the common visa policy and ii) the implications of this process for the scope of exclusive Community competence in this field and for the role of the European Commission.

Chapter 10 concludes by returning to the heart of the territorial sovereignty question, namely the decision as to who gains access to the common territory. The chapter assesses to what extent the criteria of the EU have become as transparent, detailed and objective as they should be and as the EU's own partners expect them to be. It also

explores the potential for a further application of the road maps for visa liberalization or 'visa conditionality' in the context of the European Neighbourhood Policy or other external relations with other third countries. This chapter also analyzes the *Soysal* judgment in which the ECJ concluded that the EU-Turkey Association Agreement implies potentially important limitations for the ability of the EU and its Member States to impose visa requirements on Turkish citizens.

CHAPTER 1 – THE VISA AS AN EXPRESSION OF TERRITORIAL SOVEREIGNTY

This chapter provides an overview of the key object of this study, namely the nature of the concept 'visa', and how it is likned to sovereignty, especially in the EU context. The chapter is divided into three sections, each exploring these elements in turn, with a fourth section drawing conclusions.

Starting with a definition of the concept of the visa, the chapter covers the theoretical and historical developments of this concept and then concentrates on visa policy issues at the national level. The focus is on the policy functions of the visa, the factors influencing policy formation and the implementation of visa policy. These elements constitute the exercise of territorial sovereignty in reality.

This background material is designed to help answer the following questions:

- What are the elements of visa policy most likely to be regulated at national level?
- What are the factors that influence the decisions taken on these elements?

A final section provides some quantitative evidence on the importance of different types of visas in the European context.

1. What is a visa?

As with any complex notion, the term visa has many different connotations, depending on the context in which it is used.

1.1. Usual meaning of 'visa'

Nowadays the word 'visa' is so widely taken to mean an international travel document allowing free movement between countries that it is difficult to imagine a meaning outside the context of border control. But, when looking at the definitions given by linguists, different meanings do emerge.

The Oxford English Dictionary defines ***visa*** as "*an endorsement on a passport indicating that the holder is allowed to enter, leave or stay for a specified period of time in a country*".[1] The origin dates from the 19th century and has been adopted into English from French.

The word ***visa*** - original meaning: "things seen" derives from the Latin verb *videre* meaning to see, to observe. [2]

In French, to which we owe the modern day revival of the term ***visa***, it has a much wider meaning than the pure migration instrument we find in other languages.[3]

In the *Vocabulaire Juridique*[4] we can find the following definition:

> A formality meant to authorise a foreigner to enter the national territory, either to cross it or to stay temporarily and materialised through the posting of a mention with this effect in a passport (short-stay and long-stay visa).

In the more specialized field of consular law, LEE defines visa as "a stamp or endorsement placed upon a passport testifying that the passport having been examined and found in order, the bearer is entitled to passage to or continued residence in the country granting the visa".[5]

As the above definitions show, a ***visa*** is always a type of permission; an authorization to enter the territory of a state but it is not only the physical manifestation of the authorization but also the process itself.

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[1] J. PEARSALL (ed.), *Concise Oxford English Dictionary*, 10th edition, Oxford University Press, (Oxford, 2002), p. 1601.

[2] *Etymologisches Wörterbuch des Deutschen*, erarbeitet unter der Leitung von Wolfgang Pfeifer, (Deutscher Taschenbuch Verlag, 1999).

[3] In some of the early sources, dating from 1527, it was defined as an "attestation that an act was examined and which makes the act valid". In a source from 1912, a ***visa*** is identified as a "stamp posed on a passport". And although the word is used in some theological and economic contexts, its most important use is reserved for law.

[4] Association Henri Capitant, *Vocabulaire Juridique*, publié sous la direction de Gérard Cornu, Quadrige, (Paris, 2004).

[5] L. LEE, *Consular Law and Practice*, Clarendon Press, (Oxford, 1991).

1.2. Meaning in the context of European law

The first definition of a visa at European level is not to be found in a primary or secondary legislation document but in a judgment of the European Court of Justice, in a case which did not deal directly with visas. In the 1979 case of *Pieck*[6] the ECJ held that the terms "entry visa or equivalent requirement" covered any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever the place or time at which that leave is granted and in whatever form it may be granted.[7]

Later, when the first agreements with effect on visa policy were signed, the Schengen Agreement[8] and in particular the Convention implementing the Schengen Agreement,[9] did not contain any specific definition of the term visa but referred to it directly in their texts.

The official European definition appeared in 1995 in a Regulation determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States.[10] Article 5 of the Regulation stated that:

> Visa shall mean an authorisation given or a decision taken by a Member State which is required for entry into its territory with a view to:
>
> - an intended stay in that Member State or in several Member States of no more than three months in all,
> - transit through the territory of that Member State or several Member States, except for transit through the international zones of the airports and transfers between airports in a Member State.

[6] Case C-157/79 *Pieck* ECR [1980] 2171.

[7] Ibid., para. 10. The dispute arose in relation to the implementation of Directive No 68/360 which explicitly forbids Member States to demand visas from EC nationals migrant workers (Article 3 (2) of the directive). However, there is a possibility to request visas from the family members of the migrant worker, who are third country nationals. Still, the Member States are obliged, according to Article 9(2) of the directive, to facilitate the issuing of visas and to issue them free of charge.

[8] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985.

[9] Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990.

[10] Regulation No 2317/95, O.J. 1995, L 234/1.

This definition is still valid today and is reproduced with small changes in the 2001 Regulation listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.[11]

> Visa shall mean an authorization issued by a Member State or a decision taken by such State which is required with a view to: entry for an intended stay in that Member State or in several Member States of no more than three months in total; entry for transit through the territory of that Member State or several Member States, except for transit at an airport.

There was a different definition for transit visas, in particular given in a Third Pillar instrument adopted in 1996, as "*documents affixed to passports or travel documents which permit a third country national to pass through an airport but not to enter a state*".[12]

As far as the permitted duration of stay is concerned, visas are defined as short stay visas and long stay visas, and as such imply different legal consequences. The short stay visas are defined as documents affixed to passports or travel documents which permit the holder to arrive at the border of the issuing state and, subject to further checks, to pass that border and stay on that territory for a limited period of time, usually three months (but in some cases, such as the UK or Australia, the period can be as long as 6 or even 12 months). During that stay, the holder of the visa is not allowed to undertake any employment but could be engaged in economic activity, such as meeting clients or settling contracts.[13]

While on the European level we still speak in terms of a certificate and a process, there are two key differences to the national level: the issuing authority and the effects of the decision. While on the national level, there is inevitably a single nation state taking the decision and giving the authorization that ultimately only affects its own territory, on the European level, in practice, we have one nation state taking a decision and giving authorization that can affect the territory of another state. It is still not the Union that issues the European visas but its Member States and in doing so, by

[11] Regulation No 539/2001, O.J. 2001, L 81/1.
[12] O.J. 1996, L 63/11.
[13] O.J. 1999, L 72/2.

issuing a common visa and recognizing the visas issued by their partners, their hospitality is also extended to the territories of their partners.

1.3. Other countries

In the United States there are two major categories of visa: immigrant (permanent) and non-immigrant (temporary). A visa allows an individual to travel to the US border and seek entry into the United States. However, holders of visas are not guaranteed automatic admission to the United States and inspectors at the border always have the final discretion to permit or deny entry.[14]

The definition of a visa is of special importance when considering reciprocity. Whether a certain requirement imposed on incoming travellers can be qualified as a visa or not, determines whether the automatic (in some cases) reciprocity mechanism will enter into force. Such was the case with the proposed ESTA (Electronic System for Travel Authorisation)[15] which the United States introduced for the citizens of countries participating in the Visa Waiver Programme. In this case, the European Commission had to examine the proposal and determine whether or not it could be considered as a visa.

1.4. Working definition and key elements

Based on the definitions outlined above, we can extract the following key elements of the term visa, which will be used and analyzed in the following chapters. A number of criteria can be used:

1. Form – a visa can be either the act of examining a case and the issuing of authorization, or the physical form of that decision (a stamp, for example);
2. Issuing authority – a state authority, as linked to the sovereign right of a state to determine who and under what conditions a traveller enters its territory.

[14] For a recent review of the US visa procedures, see YALE-LOEHR, PAPADEMETRIOU AND COOPER, *Secure Borders, Open Doors: Visa Procedures in the Post-September 11 Era*, Migration Policy Institute, (Washington, 2007).

[15] For the main characteristics of the system see http://www.visitusa.org.uk/visitors/esta.aspx

3. Validity – valid on certain territories for a specified length of stay or for transit.

2. Theoretical and historical background to the origins of the visa

The concept and usage of the visa is inextricably linked to the concept of sovereignty. This section explores this link by providing some background to the origins of the visa. Moreover, visas have a dual nature; as a document and as a procedure. As a document, they are developed in parallel with the development of the passport. As a procedure, they are developed as part of the entry control system of each state. Both elements also have a long history behind them.

2.1. Sovereignty v. interdependence

MAX WEBER put forward the argument[16] that a central feature of the modern experience was the successful expropriation by the state of the "means of violence" from individuals. Drawing on WEBER's idea, TORPEY[17] argues that "*modern states, and the international state system of which they are part, have expropriated from individuals and private entities the legitimate 'means of movement',*[18] *particularly though by no means exclusively across international borders*". Limitations on 'means of movement' already existed in pre-modern times, of course. In feudalism serfs, among others, were tied to a territory by their lord. Some forms of feudal serfdom persisted quite late in the Russian empire, which might be another reason why the free movement of people is a more sensitive issue in Eastern Europe than elsewhere (see also Chapter 7 on this).

The basic idea of TORPEY is that the ways in which states regulate movement constitute the very "state-ness" of states. He claims that states have sought to monopolize the capacity to authorize the movements of persons – and unambiguously to establish their identity in order to enforce this authority. States' efforts to

[16] M. WEBER, *The theory of social and economic organization*, Free Press, (New York, 1964).

[17] J. TORPEY, *The Invention of the passport: Surveillance, Citizenship and the State*, Cambridge studies in law and society, (Cambridge, 2000).

[18] "Means of movement" should be understood to mean the various documents required by the state before the individual is effectively allowed to move and in particular to cross international borders.

monopolize the legitimate means of movement have involved a number of mutually reinforcing aspects: the gradual definition of states as nation states and the codification of laws establishing which types of person may move within or across their borders; determining how, when, and where they may do so. These efforts also involve the stimulation of the development of techniques for uniquely and unambiguously identifying each and every person on the face of the globe from birth to death; the construction of bureaucracies designed to implement this regime of identification and the scrutiny of persons and documents to verify identities; as well as the creation of a body of legal norms designed to adjudicate claims by individuals to entry into particular spaces and territories.[19] The creation of the modern passport system has led to the treatment of any unauthorized movement as illegal and thus consolidated states' monopoly over the "means of movement". Finally, TORPEY holds the view that modern "nation-states" and the international system in which they are embedded have grown increasingly committed to and reliant upon their ability to make strict demarcations between mutually distinct bodies of citizens, as well as among different groups of their own citizens. The need to distinguish "who is who" becomes especially acute when states wish to regulate movement across external borders. The idea of belonging, the protection that a state can offer as well as the obligations of its citizens that are at the root of the concept of citizenship are all undermined when people cross borders.

From a legal perspective, there is a debate about the existence or non-existence of a right permitting a state to impose direct[20] controls on alien immigration.[21] In essence this is the question of whether any rule of international law requires a state to admit aliens onto its territory.[22] And to answer that question, one can relay one of two very different principles: the principle of sovereignty and the principle of interdependence.

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[19] TORPEY, op.cit., p. 7

[20] 'Indirect' immigration controls; i.e. measures designed to affect the rate or composition of migrant flows by altering the conditions under which migrants will live, once they have been admitted to their new domiciles. See R. PLENDER, *International Migration Law*, Martinus Nijhoff Publishers, (Dordrecht, 1988).

[21] R. PLENDER, *International Migration Law*, Martinus Nijhoff Publishers, (Dordrecht, 1988). The question is also discussed in detail in A. MELONI, *Visa Policy within the European Union Structure*, Springer, (Berlin, 2006).

[22] This issue is quite distinct from the right to leave one's own country, which has been enshrined in the European Convention for the Protection of Human Rights

According to PLENDER, the first is supported by the majority of Anglo-Saxon theories, while the second, by the European continental school and Latin American scholars.

The choice of principle also determines the differences, in some instances quite significant ones, between the immigration policy of the Anglo-Saxon countries and the European continent. Such differences can be observed at every stage at which immigration controls are performed – from the procedure governing visa application to the presence, or lack of, a judicial remedy in the case of refusal of visa or entry. Moreover, as will be demonstrated in Section 3 of this chapter, when the national visa policies are analyzed, the major choice of each visa policy – on whom to impose visa requirements – is usually made by balancing the need of a country to ascertain its sovereignty with the need to acknowledge its interdependence.

2.2. Historical development of the concept of the visa

Because of the dual nature of the visa, as a document and as a procedure, the visa is usually considered either in the context of identity documents, mainly the passport, or in the context of entry controls. Thus, there are no studies dealing explicitly with the historical development of the visa, and information is usually dispersed in sources that deal with passports or entry controls. The most recent study on passports was carried out by Torpey, and due to the link between passports and visas, contains certain references to visas. Earlier references can be found in books by TURACK and GOODWIN-GILL.[23] A concise review of their findings is necessary for the identification of the factors that influenced the different countries' visa policy choices.

The history of the concept of the visa is inevitably intertwined with the history of the passport, which in turn is linked to the rise of the nation state, starting with the French Revolution. It is true that some regulation of the movement of aliens also existed in the Middle Ages, but this was greatly determined by commercial needs and limited to granting travel rights to merchants. Examples from that period can be found both in Western and Eastern Europe. In English common law it was established that an alien

[23] For the history of the passport, see also D. TURACK, *The passport in international law*, Lexington Book, (Lexington,1972); and G. GOODWIN-GILL, *International Law and the movement of persons between states*, Clarendon Press, (Oxford, 1978).

committed no offence if he entered England without sovereign permission and both the principle of sovereignty (allowing the King to exclude unwanted individuals) and the principle of free movement (giving aliens the right to enter the kingdom) co-existed.[24] On the other side of Europe, in Bulgaria, the Second Bulgarian Kingdom established relations with the merchants of Dubrovnik and guaranteed their right of entry.[25]

The fundamental principle set down by VATTEL in 1758 still holds:

> A sovereign may prohibit entrance into his territory, either to all foreigners in general or to certain persons, or in certain cases or for certain particular purposes, according as the welfare of the State may require.[26]

This approach changed dramatically with the emergence of 'nation states'. Under mercantilism, the foreigner, although otherwise treated like any other subject in legal terms, typically enjoyed greater freedom to emigrate than a native-born subject. Towards the latter half of the 18th century foreigners increasingly became exposed to the same hindrances as nationals with respect to departure from their homeland. Moreover, they tended to be seen for many reasons as a potential threat (they might spread dangerous ideas and they could not be expected to help defend the country in any international conflict). The foreigner was perceived more and more *ipso facto* as a suspect[27]. With the French Revolution came then the modern passport system as we know it today and with it the concept of the visa.

2.2.1. 19th century developments

France

Amid the many debates on the passport system in France, a Frenchman, Montagnard Julien Souhait, already envisioned in the 18th century the international visa system

[24] For details see Plender, op. cit., p. 62.

[25] D. TOKUSHEV, *History of the Bulgarian Medieval State and Law*, SIBI, (Sofia, 2009). *Reference translated from Bulgarian.*

[26] E. DE VATTEL, *Le Droit des gens*, vol. II, § 94, (1835), cited in LEE AND QUIGLEY, *Consular Law and Practice*, 3rd edition, Oxford University Press, (Oxford, 2008), p. 221.

[27] J. TORPEY, *The Invention of the Passport: Surveillance, Citizenship and the State*, Cambridge studies in law and society, (Cambridge, 2000), p.42.

that would gradually develop over the next century and a half.[28] His argumentation is interesting: Souhait begins his remarks by noting that the government required passports for all those leaving their domicile, "*as proof of their good conduct and their respect for liberty and public tranquillity*." But if this were reasonable enough for French persons, he continued, there was all the more reason to require passports of foreigners, "*men who cannot offer, like the French, the natural guarantee of their attachment to la patrie, nor the same means to repair the damage they might do through corruption and immorality*." Souhait insisted that the foreign emissaries could not be trusted to take French security concerns into account in their passport practices.

Souhait then delivered a statement that directly articulated the notion of the state's monopolization of the legitimate means of movement, as well as the shift towards making the French political space a place "of and for" the French:

> Passports are a police measure of the government on whose territory travellers circulate. None other than the government, or its agents, has the right to bestow them, for none other has the interest and none other has the right and obligation to watch over good order, liberty and the public security. The agent of the foreign power cannot be your agent, even in his own interest; you cannot give him any authority, even less one that the constitution expressly delegates exclusively to the French and to the magistrates of the people. The foreigner, like every resident, is subject to the laws of the country in which he travels. This subjection is the price of the protection that he receives; it is the prerogative and the right of the public authority. A natural-born Frenchman may not travel in France without the permission of the government or the magistrates of the people; the foreigners must therefore also obtain permission.

One way to obviate the problem of foreign undesirables entering the country with documents issued by foreign rather than French authorities, he suggested, would be to establish a system whereby French representatives in the *traveller's country of origin* would issue passports to those wishing to come to France. Unlike foreigners, French officials could be relied upon not to distribute passports to those who might undermine public order in France.[29]

[28] TORPEY, op. cit., p. 52-53.

[29] TORPEY, op. cit., p. 52-53.

Germany

Early in the reign of Frederick William I of Prussia (1713-1740), a law intended to tighten controls on beggars for the first time required foreigners to have in their possession a passport, which was to be visa-ed nightly at the 'way stations' along their route. In 1813, a new law was adopted and new documentary requirements introduced. Upon entering Prussian territory, travellers from abroad were obliged to take possession of a Prussian passport issued not by local authorities (the usual and accepted practice), but by higher level officials ranging from the Royal Chancellor down to the central government's police representative at provincial level. The persistence of the practice whereby incoming travellers were furnished with a passport by the receiving state, rather than by the state of the traveller's origin, is notable here.

Later the passport law of 1817 liberalized the restrictive provisions of the earlier law, mainly by restoring to local, border and port officials the authority to issue valid documents for entry into Prussia. Most importantly, Prussian diplomats accredited at foreign courts, official trade emissaries and consuls – and most notably – the 'national' and provincial officials of other states were also added to the list of those authorized to issue passports for entry.

A liberal development was the Pass-Card Treaty (Passkartenvertrag) of 1850 signed by "all the German states" except the Netherlands, Denmark, Hessen-Homburg, and Lichtenstein, which loosened the passport requirements for travellers within these states.[30] The treaty simplified and standardized the information that was to be included in pass-cards. The practice of taking away a traveller's pass-card for the duration of his or her stay was not expressly abolished, but in practice merely showing the card to the authorities was regarded as sufficient. Above all, visas were no longer required. Soon after, an agreement between Austria, Bavaria, Württemberg, and a number of other states abolished reciprocal visa requirements; Bavaria soon abandoned the practice altogether as "useless".

[30] TORPEY, op. cit., p. 58.

Despite lingering mercantilist attitudes, rulers in the German lands increasingly found themselves drawn towards a more liberal stance in matters of migration. Over the next few years passport and visa requirements were relaxed or abolished between 'German' states (including the Netherlands) and a series of other countries such as England, France, Belgium and the Scandinavian countries (although such relaxation only acquired force where it was reciprocal). Saxony eliminated visa requirements entirely in 1862. Also in 1862, Switzerland eliminated visa requirements and abolished the requirement of a passport for entry into or travel within its territory.

A further step was the Passport Treaty concluded in 1865 by Saxony, Bavaria, Hanover and Württemberg. The treaty abolished the requirement that travellers within these states, whether their subjects or foreigners, be equipped with a passport for entry, exit, or internal circulation, as well as any obligation to have papers visa-ed by the authorities. This was followed a few years later by the liberal North German Law of 1867, which remained the fundamental statute regarding passport controls in Germany until after the Second World War.

These developments in 19th century Germany signalled a broader European shift towards greater freedom of entry and exit, even for foreigners. In that period there were already established notions of reciprocity among nations and of the treatment that states expected for their nationals abroad.[31]

The 19th century German experience of liberalization and integration is instructive because it seems to follow a pattern which can also be observed in European integration today: travel is made easier initially only among citizens of a group of closely related countries, and liberalization then spreads to non-citizens and other countries.

USA

In 1884, the United States adopted an act which contained an early version of the system of 'remote control' of immigration – involving passports and visas stamped at the emigrants' point of departure by consular officials of the destination country. In a

[31] TORPEY, op.cit., pp. 57-100.

case involving the aforementioned act (dealing with Chinese immigrants in the United States), the Supreme Court ruled that "*any independent nation must have jurisdiction over its own territory, including the power to exclude aliens, if it were to be truly sovereign*".[32] This was reaffirmed in 1892, when the US Supreme Court ruled that:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within the dominions, or to admit them in such cases and upon such conditions as it may see fit to prescribe.[33]

Thus the US adopted a stance that was identical to that of the European states although, as an immigration state, it had developed a tradition of accepting large numbers of foreigners. In the US the visa system was used from the beginning to control immigration. By contrast, in Europe, the visa system was more directed at temporary travellers (far fewer in number) and the concerns were mainly of a national security type.

2.2.2. Developments after the First World War

With the beginning of the First World War, most countries in Europe introduced stricter border controls, requiring passports and visa in most cases.

For example, in Germany the emergency clauses of the law were used to introduce new passport restrictions. Now, anyone who wished to enter or leave the territory of the Empire was to be in possession of a passport. Moreover, foreign passports for the purposes of entry into the Empire were required to have a visa from German diplomatic or consular authorities. A further order from 1916 contained the terms and conditions for the issuance of visas, depending on whether these were for exit from, entry into, or transit through German territory. Similar rules were adopted by most other states.

The general anxiety about borders that prevailed during the war did not subside with the end of the war. Instead, the "*temporary measures implemented to control access*

[32] *Chae Chan Ping* v. US, 130 US 581 (1889).

[33] *Nishimura Ekiu* v. US, 142 US 651, 659 (1892), cited in LEE, op.cit.

to and departure from the territories of European states persisted into the interwar period".[34]

This was not limited to Europe. In 1924 the new American Immigration Act provided that American consuls abroad be charged with the task of keeping control of the quota introduced earlier and with distributing visas accordingly.

The newly permanent passport controls that persisted after WWI generally applied not just to foreigners but to both citizens and aliens. This was a necessary outcome of the desire to control borders against unwanted entrants, and aliens had increasingly come to be seen as lacking any prima facie claim to access the territory of a state other than their own.

2.2.3. The Jewish visa problem

With the coming to power of the Nazis in 1933, many laws, such as those on citizenship, naturalization and passports, were changed. In 1937, following the authorization by the "Law on Passports, the 'Foreigner Police' (Auslaenderpolizei), and Residential Registration, as well as on Personal Identity Documents", the 1867 law of the North German Confederation was abolished. It was this law that had eliminated passport requirements other than as temporary, emergency measures.

The newly established international visa system was put to the test at the League of Nations conference in Evian, France that was convened in early July 1938 to address the growing problem of refugees from Germany and Austria and their difficulties in finding safe havens of settlement. The Nazi plan to expel the Jews was not necessarily consistent with an international system that reserved the right to admit only those whom they chose to admit. Although all of the delegations to the Evian conference expressed their commitment to humanitarian assistance, only the Dominican Republic made a concrete offer of admission. Some countries, like Switzerland, responded to the increased number of refugees from Austria by imposing visa requirements for the holders of Austrian passports.

[34] TORPEY, op. cit., p. 116.

Whether or not the 'paper wall' created around the West, with its strict visa requirements and quotas and the unwillingness of most countries to admit Jews as refugees, contributed to the death of many Jews is a subject of ongoing debate. According to the now widely-held view, defended by DAVID WYMAN[35], the immigration restrictions that emerged from the First World War and their strict enforcement during the 1930s in an effort to protect national labour markets during the depression consigned many Jews to their deaths, because they were unable to find refuge from Nazi persecution.[36] The opposite view is defended by WILLIAM RUBINSTEIN[37], who argues that the notion of 'paper walls' surrounding Western democracies – and the broader claim that the democracies could have rescued more Jews in various ways, such as by bombing Auschwitz – is an historical myth. Rubinstein insists that the 'paper walls' argument is misguided for one simple reason. According to him, relatively few Jews left Germany before November 1938 because they believed that this was one of those periodic outbursts of anti-Semitism that would soon 'blow over'. But, in contrast to the claims of the critics of Western policies towards the Jews, those who did leave Germany found refuge in Western countries without great difficulty. What must be understood, in Rubenstein's view, is that after the beginning of the war in September 1939, the obstacle Jews confronted was no longer that of getting into other countries, but rather that of getting out of Nazi-controlled Europe. According to TORPEY, like many other groups, Jews faced significant barriers to admission into countries of potential safe haven during the 30s, and the 'paper walls' that had been erected during the early interwar period complicated the negotiation of an international space for all of them. With the development of new bureaucratic apparatuses since the First World War, states had become much more effective at identifying possible interlopers and using documentary restrictions to keep out those they did not wish to admit.

[35] DAVID S. WYMAN, *Paper Walls: America and the Refugee Crisis, 1938-1941* (University of Massachusetts Press, 1968)
[36] TORPEY, op. cit., pp.131-143.
[37] WILLIAM D. RUBINSTEIN, *The Myth of Rescue: Why the Democracies Could Not Have Saved More Jews from the Nazis*, (Routledge, 1997)

2.2.4. Post-war developments

After the end of the WWII, efforts to reduce the severity of the passport regime inherited from the interwar period were made at the national level. Even before the war had officially ended, Belgium and Luxembourg had exchanged notes aimed at reducing passport controls. By 1950, the Netherlands joined this effort and nationals of the three countries were given the right to travel between them with only a national identity card[38]. In mid-1954, Denmark, Sweden, Norway and Finland agreed that their nationals could travel without passports or other travel documents to these countries and such persons no longer needed to be in possession of a residence permit when residing in a Scandinavian country other than their own. These arrangements were extended by a 1957 Convention that provided for the elimination of passport controls at the internal frontiers of Scandinavian countries (which thus implicitly extended the freedom of movement to non-nationals travelling among these countries).[39]

Since then, one of the main objectives of the advocates of liberalized movement in Europe was the creation of the European passport. However, the Council of Europe's Committee of Experts on Passports and Visas abandoned the broader aim of a European passport and instead submitted proposals to the Committee of Ministers for a more restricted form of standardization,[40] proposals which were adopted in March 1952.[41] The drive towards greater freedom of movement in post-war Europe was closely connected to the effort to create a common market. Apart from the agreements reached within the remit of different organisations, in 1985 the Schengen Agreement signed between France, Germany and the Benelux countries was ultimately designed to achieve the goal of unrestricted travel within Europe.

[38] This is all the more remarkable as the Netherlands refused national ID cards, partly in reaction to Ausweis obligation during occupation.

[39] These regional travel areas are studied in detail in Chapter 3.

[40] See Council of Europe, Recommendation 39, *Text adopted by the Assembly*, 1949.

[41] The Committee of Ministers in 1952 adopted two resolutions urging the governments to standardize national passports and abolish visas (Third Report of the Committee of Ministers, Documents, 1952, document 2, para 93-95). By January 1956 visas were effectively abolished for nationals of all Member States (Council of Europe News, January 1956, p. 3), cited in L. LEE, *Consular law and practice*, 2nd edition, Oxford University Press, (Oxford, 1991).

3. The function of the visa at national level today

3.1. Policy functions of visas

Nowadays the visa is considered to have three main policy functions: to guarantee national security, to keep out crime and to control immigration.[42] It is employed as a policy tool in the context of foreign policy and immigration policy.

Until the mid-1980s, the visa was generally considered as a foreign policy tool, and in order to determine whether a country was to be placed on the visa list or not, one of the main determining factors was the type of relationship that existed between the two states in question. Reciprocity thus played an important role in visa imposition.

National security. The origins of the visa are much more linked to security concerns than to inter-state relations, however. As was demonstrated earlier, visas appeared for the first time during the time of the French Revolution with the purpose of restricting the access of aliens into the country, thus increasing state security. Therefore, one of the policy functions that can be considered includes guaranteeing national security by excluding those that are considered 'undesirable' (implemented by a list of designated persons who can be refused admission).

The security function, defined as such, was historically always reinforced in periods of conflict or inter-state tension, when distrust in the 'other' was high and tensions led to the imposition of special limitations on their nationals, including visa restrictions. The security function can be considered as the classic visa function, also because of its link to reciprocity (discussed above), where the imposition of visa requirements is carried out on the basis of bilateral relations at a particular point in time. In addition, it follows on from the classic approach that visas are determined between states, on the basis of the relations between them, rather than on the basis of the behaviour of individuals belonging to a particular state.

In this sense the visa function is clearly linked to national security and is meant to exclude potentially dangerous individuals based on their country of origin.

[42] These functions can be retrieved from the Explanatory Memorandum to the 2001 Visa Regulation. MELONI has also identified them at MELONI, op.cit., p. 37.

After the mid-1980s a new logic of determining visa restrictions gradually took hold, which was much more linked to individual behaviour than to the bilateral relations between two countries. Two new policy objectives emerged: keeping out crime and controlling immigration.

Keeping out crime. The function of keeping out crime is well explained in the Explanatory Memorandum to the present Visa Regulation, with an illustration of where the behaviour of a particular individual can affect the perceptions of his country of origin and indirectly influence the visa requirements imposed on its nationals. Meloni also cites an interesting example from Italian legislative practice, where the respective law[43] included as one of the criteria for determining which nationals should be subject to visa requirements, the nationality of those sentenced for drug trafficking during the three-year period prior to determination. In this case individual behaviour rather than the policies of a state determine the position of a specific country on the visa list.[44] This approach can also be considered as an example of individual risk assessment.

In practice, this policy function can also be served by the list of 'undesirable' visitors drawn up by every country (or is common in the case of common travel areas). Similarly, the crime-control function of visas can also be served by the specific grounds for denials that are to be found in national legislation.

Immigration control. Visas have always been a tool for immigration control in the countries of immigration (USA, Australia, and Canada). Their system is based on the assumption that each visa applicant is a potential immigrant and therefore the balance of their immigration control system generally tilts towards strict entry control.

[43] This law is of course no longer relevant today since the black list has been communitarized (see Chapters 3 and 5). Legge Martelli, Legge 28 febbraio 1990, n. 39 (in Gazz. Uff., 28 febbraio, n. 49). Conversione in legge, con modificazioni, del decreto-legge 30 dicembre 1989, n. 416, recante norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato. Disposizioni in materia di asilo. [Converting and amending Decree-Law of 30 December 1989, n. 416 on emergency measures for political asylum, entry and residence of third country nationals and regularization of non-EU nationals and stateless persons already present in the territory. Provisions relating to asylum].

[44] BIGO AND GUILD, *La mise à l'écart des étrangers : la logique du visa schengen*, L'Harmattan, (Paris, 2003).

However, after the fall of the Berlin Wall and the fears of mass immigration to the West, controlling immigration, including through visa requirements, has emerged as an important policy tool in Europe.

As argued above visas are one of the ways of screening potential immigrants in immigration countries and generally form part of national immigration policy. However, in Europe the link between immigration controls and visas is present, but not so dominant.[45] If one looks at the criteria determining whether a country presents an immigration risk or not, these can include criteria such as the number of suspected illegal residents, the number of refused asylum applications; factors that are generally deemed to demonstrate the likelihood of illegal immigrants from the country in question.

There are two interrelated factors that influence the immigration function of visas, at least in Europe. One of them is the general public's attitude towards immigration. In periods of economic depression and even more so recession, when the numbers of the unemployed grow and there is a general feeling of economic instability, the hostility towards immigrants who are perceived to be stealing jobs is higher, and this is often reflected in the imposition of visa requirements. This can explain some of the later tensions in immigration policy in general and visa policy in particular at the European level. Despite the fact that economic policy and conditions should supposedly be the same or similar, there are substantial differences between Member States in economic growth at any one time and these are inevitably translated into different attitudes towards immigration. Two major fronts of difference persist, one is between the North and South and the other is between East and West. These differences will be explored later.

The second factor important to Europe is the perception that grew in the late 1990s that there were too many immigrants trying to benefit from the welfare systems in Europe and the integration of these immigrants presented challenges to European

[45] A further reason for the difference in attitude is also that at least all continental EU Member States have a system of national residence control with an obligation of all residents to report their presence to the local authorities. This second line of defense against undesirables makes it somewhat easier to relax controls at the border via visas.

societies. Moreover, the measures which could be used by different states to control immigrants already on their territory were limited by the human and civil rights guarantees offered in Europe.

This approach can explain how visa policy and the possible relaxation of visa requirements is linked to bilateral agreements with the immigrants' countries of origin, ultimately aimed at decreasing the number of immigrants. Typical measures in this regard include readmission agreements, taking on obligations related to the increase of the security of identity documents, and the joining of conventions related to protection against human trafficking or the protection of human rights, which could increase the chance of a country being considered as 'safe' in the context of asylum applications.

MELONI includes visa requirements in the definition of 'external' immigration control measures; those that are aimed at preventing the arrival or entry of the migrants. Next to visas, typical manifestations of 'external measures' include carrier sanctions; border controls; information campaigns in source and transit countries; training of airline staff and immigration officers and the posting of liaison officers for the detection of fake and forged documents.[46] 'Internal' measures of immigration control would include: identity checks, residence and work permit requirements; employers' sanctions; inspection; removal; restriction of access to social benefits and restrictions on legal integration.

Considering the developments in new technology, the latest development in visas as an immigration tool is the move towards additional security features in the visas themselves, thus bringing them closer to an identity document. Moreover, the creation of special databases linked to the visa application and visa denial follows a similar line.

The three policy functions of visas outlined above: to guarantee security, limit crime and control immigration, are the cornerstone of any formulation of national visa policy. However, when it comes to determining which country should be included on

[46] MELONI, op. cit., p. 39.

the visa black list and which should be exempt from visa requirements, a number of factors are at work that will be studied below.

3.2. Factors that influence the formation of visa policy at national level

When it comes to deciding on a particular national visa policy, apart from the technical aspects of its implementation (such as format, conditions for issuing, administrative authorities involved, etc.), the main decision to be taken is which countries are to be placed on which country's visa list and which are to be exempt. This decision always involves the weighing of two types of factors: those that push towards a more liberal visa policy, such as economic relations, the level of bilateral trade, tourism, cultural links, etc. and those that push towards a more restrictive visa policy: security, illegal immigration and cross-border crime concerns. Ultimately, visa policy at the national level is always a result of the balancing of these factors at a particular moment in time.

The factors that influence the imposition of visa requirements at national level very much depend on the particular situation of individual countries. Tourism is an influencing factor for some, while for others maintaining ethnic links or national territory continuity is important. There is no comprehensive study into the factors that influence visa policy formation, or the relative weight of each of them.

However, in a study of 2005, ERIC NEUMAYER tries to bring some clarity to this issue with an empirical study based on the bilateral visa restrictions for 189 sovereign nation states.[47] Neumayer studies two groups of factors, those for which the states tend to impose visa restrictions, which will be called 'negative' factors; and those for which states refrain from imposing visa restrictions. Then he tests his hypothesis empirically and comes up with some interesting findings.

'Negative' factors. The main factors that are expected to influence the imposition of visa requirements are: a possible threat of illegal immigration, and security concerns linked to either national security or to public health.

[47] NEUMAYER, "Unequal access to foreign spaces: how states use visa restrictions to regulate mobility in globalised world", *Global Migration Perspectives*, No 43, (2005).

The illegal immigration concern stems from the fear that visitors might become immigrants by staying in the country instead of returning to their home country. This fear is enforced by the fact that would-be immigrants now have more information, better contacts and easier travel access to the high-income OECD countries. At the same time, the factors pushing people towards migration such as poverty, political repression, human rights abuses, war and civil conflict, have not diminished.[48] Meanwhile, this assumption is challenged by the data showing that only 20% of illegal immigrants have crossed the border illegally, while a significant majority have entered legally but have overstayed their allowed term for a visit. Visas can be a powerful deterrent to migration because to obtain one is relatively complicated and time-consuming and might involve additional costs. Visas thus exert the dual influence of pre-selection and deterrence.

Apart from immigration, another concern which has influenced the elaboration of national visa policy is the fear linked to crime and public health. There are concerns of potential infiltration by members of organized crime groups, potential terrorists, drug traffickers and other *persona non grata*. There have been cases when entry was refused to people with infectious diseases (e.g. AIDS)[49]. The emphasis is on the threat to national security by politically motivated violence and transnational networks of crime.

'Positive factors'. On the other side of the coin are the factors that push towards a more liberal visa policy. Obviously, it can be expected that countries will refrain from imposing visa restrictions on countries from which they do not fear either illegal immigration or the entry of unwanted individuals. "*Poorer countries have an incentive to exempt passport holders from high-income countries from visa restrictions in the hope of bolstering foreign investment and knowledge spill-overs into their country. Major tourist destinations have an incentive not to impose visa*

[48] NEUMAYER, op. cit., p. 8.

[49] See for example the 20 year old US travel ban against people with HIV, lifted by President Obama as of 1 January 2010. For a comprehensive list of other countries with restrictions on entry, stay and residence, see: www.hivtravel.org

restrictions on sending countries in order to remain attractive in the increasingly competitive market of mass tourism".[50]

Apart from economic reasons, there are also political reasons to grant a visa-free status. Those usually include factors such as belonging to the same region or having historic or civilizational links.

> Historical, geographical and civilizational patterns of shared belonging are likely to influence visa restrictions given that the latter are a powerful manifestation of inclusion and exclusion. Providing for visa-free travel for the nationals of a certain country can be interpreted as one of the most welcoming types of status as regards access to territory, short of passport union, where all internal restrictions on travel are lifted. However, such unions are rather rare with only four of them functioning at present, of which three are in Europe: the Nordic Union (Denmark, Finland, Iceland, Norway and Sweden), the Schengen area, the UK-Ireland Union and the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates).[51]

It would be interesting to speculate on the reasons that make Europe the most prolific area in the development of passport union. One of the reasons could be the general civilizational closeness and the integration processes going on within it. However, another explanation could be simply geographical, considering that Europe (at least in its EU part) has a relatively small territory compared with the state structures of other continents, and thus without the simplification of travel formalities it would be impossible to maintain a reasonable level of exchange in every conceivable field.

In his work, NEUMAYER started from the assumptions outlined above and built upon a model comparing bilateral visa restrictions based on GDP per capita, restrictions to political freedom, armed political conflict, international outbound tourists, international tourist receipts, bilateral trade, same region, same civilization, colonial links, and restrictions to political freedom in the home country.

What he discovers is that reciprocity still governs most visa imposition policies. However, there is an imbalance in the system as OECD passport holders enjoy far fewer restrictions on travel abroad than their countries impose on passport holders from other countries. NEUMAYER thus identifies as the most striking feature of the

[50] NEUMAYER, op. cit., p. 8.

[51] M. SALTER, *Rights of Passage: The Passport in International Relations*, Lynne Rienner, (Boulder, 2003).

system of bilateral visa restrictions the high degree of inequality in access to foreign spaces. On the one side are the 25 countries facing the fewest visa restrictions, and they are all Western high-income OECD countries. On the other side are those countries whose nationals need a visa for any trip abroad; generally countries with a history of violent political conflict, strict autocratic regimes or abject poverty.

In some cases there is certain symmetry between facing and imposing visa restrictions, but this does not apply to the group of richest countries.

> Whereas the average OECD citizen faces visa restrictions in travel to approximately 93 foreign countries, the average non-OECD citizen needs a visa to travel to approximately 156 countries. Passport holders of OECD countries therefore enjoy relatively easy access to foreign spaces, but OECD countries do not generally provide easy access to their own spaces.[52]

In addition to the study of NEUMAYER, the consultancy HENLEY & PARTNERS, a firm specialized in international immigration, consular and citizenship law has developed the *Henley Visa Restrictions Index*.[53] The Index is a global ranking of countries according to the travel freedom their citizens enjoy, based on the analysis of the visa regulations in all the countries and territories of the world. The authors consider their Index to be the first time a global ranking shows the international travel freedom of the citizens of various countries as well as the international relations and status of individual countries relative to others.

HENLEY & PARTNERS also acknowledge that visa restrictions are used to control the movement of foreign nationals across borders and that the choice of imposing visa restrictions is influenced by the relations between the countries, thereby reflecting the status of a country within the international community of nations.

The findings of NEUMAYER are confirmed again in the *Henley Visa Restrictions Index* for 2009, see Table 1.1., below. The score reflects the number of countries that can be entered without a visa by the citizens of the countries listed. There is very little difference between countries until rank 9, as all countries in this group are members

[52] NEUMAYER, op. cit.

[53] Website of Henley and Partners, section on visa restrictions: http://www.henley-partner.com/citizenship/visa-restrictions/.

of the OECD with high incomes per capita. The only exception in this group is Portugal (whose specific problems in the Schengen visa system are discussed in Chapter 4). At the other end of the scale one finds poor countries, especially those involved in conflicts, whose passports offer visa-free access to only a few dozen countries.

Table 1.1. Henley Visa Restrictions Index - global ranking of selected countries 2009

Rank		Score	Rank		Score
1	Denmark	157	14	Malta	139
2	Finland	156	24	Israel	118
2	Ireland	156	17	Hungary	131
2	Portugal	156	20	Argentina	127
3	Belgium	155	23	Brazil	122
3	Germany	155	26	Romania	115
3	Sweden	155	27	Mexico	114
3	United States	155	29	Croatia	108
4	Canada	154	35	South Africa	88
4	Italy	154	38	St. Kitts & Nevis	84
4	Japan	154	42	Turkey	75
4	Luxembourg	154	44	Dominica	71
4	Netherlands	154	53	Russian Federation	60
4	Spain	154	54	Taiwan	59
5	Austria	153	61	Thailand	52
5	Norway	153	61	United Arab Emirates	52
6	France	152	70	Saudi Arabia	42
6	United Kingdom	152	72	Bosnia and Herzegovina	40
7	Australia	151	75	India	37
8	New Zealand	150	78	Egypt	34
8	Singapore	150	79	China	33
9	Greece	149	82	Jordan	30
9	Switzerland	149	83	Korea, Dem People's Republic	29
10	Iceland	146	87	Pakistan	25
11	Malaysia	145	87	Iran	25
12	Korea, Republic of	144	88	Iraq	23
13	Liechtenstein	140	89	Afghanistan	22
14	Cyprus	139			

The inequality in access to foreign spaces was summarized by KUMAR as follows:

> For those who live in affluent countries, the passport is of use for international travel in connection with business or vacations", whereas for those living in the poorer nations of the world "the passport is without any value if it does not have the visa. In other words, it is meaningless as a passport.[54]

Unfortunately it seems that this situation is likely to persist because the migratory pressure is uniformly from the poorer to the richer countries. Only a rapid convergence in levels of income could diminish this pressure. The Southern European Member States constitute the best illustration of the key importance of this basic economic factor of migration: during the 1950s and 1960s, when their levels of per capita income were much lower than those in Northern Europe, they were important source countries of emigration. Today their per capita income is close to (in some cases above) the EU average and they have all become important destination countries for immigration.

One interesting aspect in the context of the present study, which has been neglected in the literature, is that the Henley Visa Restrictions Index shows large differences among EU member countries. For example, the value for Romania is only 115, a full 40 points lower than the value for Belgium or Germany (whose passports holders can travel to 155 countries without a visa). Even among members of the Schengen area one finds large differences with the index for Hungary at only 131, 24-25 points less than the top-ranked countries from this 'visa union'. If reciprocity were to work perfectly there should be no difference among Schengen members. However, in reality reciprocity is not perfect. A country from which the EU (or rather its Schengen area member countries) requires a visa might not 'reciprocate' and might not impose a visa requirement on some member countries.[55]

Another source of differentiation among Schengen members is the case of negative reciprocity: a country might impose visa requirements on some Schengen members although the EU does not impose visa requirements on the citizens of that country.

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[54] A. KUMAR, *Passport photos*, University of California Press, (Berkeley, 2000), cited in Neumayer, op. cit., p. 11.

[55] See for example Turkey, which requires visas from Belgian citizens but not from German or Bulgarian ones, Turkey, Ministry of Foreign Affairs, Visa Information, available at: http://www.mfa.gov.tr/sub.en.mfa?cc4e437c-6769-4d79-9017-10b63c651224.

This is the case for the US and it has created a host of legal issues at the EU level, which are discussed at length in Chapter 9.

3.3. Visa policy implementation

General background. Visa policy is that part of government migration policy that deals with the rules and regulations for the admission of foreigners onto the state territory and in particular the rules for entry.

The entry and movement of foreigners on the national territory is generally regulated by Alien Laws. They deal with the entry and residence requirements.[56] Aliens are defined as those not having the nationality of the country of residence. And nationality in most cases means the citizenship of the country.[57]

Entry control. One of the ways in which a state exercises control over its territory is by laying down the conditions under which it will allow entry. In terms of the ways in which this control is exercised, there are at present two distinct systems employed by most countries in the world.

The first system is based on strong entry control, meaning that very restrictive policies are applied when entry is allowed. Such restrictions may take the form of national quotas or accepting a presumption that every visitor is a potential immigrant. In general, the entry control is based on the objective to make the entry into a country difficult. Once the entry is granted, the residence formalities are simplified. Such

[56] The analysis in the following pages is extensively based on three comparative studies of the aliens' law regulation in different countries, respectively from 1987, 2004 and 2007. The studies are: FROWEIN AND STEIN (eds), *The Legal Position of Aliens in National and International Law*, Springer-Verlag, (Berlin, 1987); I. HIGGINS (ed.), *Migration and Asylum Law and Policy in the European Union*, FIDE 2004 National Reports, Cambridge University Press, (Cambridge, 2004) and ADAM AND DEVILLARD (eds), *Comparative study of the laws in the 27 EU Member States for legal immigration, including an assessment of the conditions and formalities imposed by each Member State for newcomers*, European Parliament, (Brussels, 2008), p.563.

[57] See for example, the case of the British citizens who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law, and as such can be subject to visa requirements. These groups include: British overseas territories citizens who do not have the right of abode in the United Kingdom, British overseas citizens, British subjects who do not have the right of abode in the United Kingdom and British protected persons. See Annex I of Council Regulation No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement.

systems are more typical for 'immigration nations', such as United States or Australia or for island countries, which have a natural barrier to access.

The second type of regulation of entry is the residence control system. There the presumption of immigration does not exist and it is relatively easy to gain access to the territory (although some visa conditions can still apply). Such a system was typical for continental Europe. However, the residence formalities in such countries (most of continental Europe) are much more demanding and indeed in these countries it is often easier to gain access than to establish residence. The US (and to some extent other Anglo-Saxon countries, such as the UK, Canada and Australia) do not have elaborate residency control systems. For these countries (de facto) residency is often easier to establish than access to the territory.

However, now that most of the continent is part of the Schengen area, one can observe that there has been a move towards a more balanced system, including both entry and residence control. In the Schengen area the move was rather towards having a more restrictive system, limiting both entry (through strict visa and entry conditions), while at the same time leaving residence formalities in place.[58]

Pre-entry procedure (application for a visa). As was indicated above, the most common form of state control is the decision to grant entry. Before the invention of the modern visa system, such control was exercised for the first time directly at the border and conditional on the traveller meeting the state's entry conditions. This rule still applies in the cases where a visa is not required for travellers from certain nationalities who are granted short term access to the territory without the need to apply for a visa. In these cases, individuals are subject to one point of control at the border.

However, with the development of the modern visa system, a second layer of control has also been added, in the form of the visa application. This type of control has been

[58] WOLF, "Entry and Residence: Comparative Report", in Frowein and Stein (eds.), *The Legal Position of Aliens in National and International Law*, Springer-Verlag, (Berlin, 1987), p. 1874.

called by Bigo[59] "remote control" or "remote policing". In its essence, it provides for a control prior to the control exercised at the borders. There are three main differences between the proper entry control and the "remote control". The first difference is based on the location at which the control is performed; in the first case – directly at the border, while in the second – it is in the applicants' country of residence. The second difference is linked to the authorities involved in the control procedure. In the first case, they are the border guards of the respective country (usually linked to the Ministry of Interior), while in the second the controlling authority is the diplomatic and consular authorities in the traveller's country of residence. Finally, the substance of the checks performed is the same, whether or not the person in question meets the entry conditions as set down in the national legislation.

In the case of remote control, travellers are obliged to apply for a visa abroad and provide proof that they meet the entry conditions (by specifying aim of entry, funds available, health insurance, etc.).[60]

While in the 1980s WOLF stated that immigration countries normally required that the visa be applied for abroad when entry was sought for residence or immigration,[61] in certain cases it was still possible to apply and receive short stay visas directly at the border (usually in countries with a well-developed tourism sector). Nowadays, the rule is application for a visa prior to the date of travel and in the traveller's country of residence, even in cases of short stay. The issuing of visas at the borders is kept to a minimum and reserved for exceptions, such as refugees, for example.

The tightening of controls resulting from the development of the two-tier control system is demonstrated by the fact that although when issuing a visa the diplomatic and consular authorities check that the traveller meets the entry criteria, the visa itself does not represent an entry permit and thus does not guarantee entry into the country for which it has been issued. The visa only gives the person to which it has been issued the right to present him/herself at a border crossing point and apply for entry

[59] BIGO AND GUILD, "Policing at a distance: Schengen visa policies", in BIGO AND GUILD (eds), *Controlling frontiers: free movement into and within Europe*, Ashgate, (Aldershot, 2005).

[60] WOLF, op. cit., p. 1876.

[61] Argentina, Australia, Chile, United States (data 1986, see WOLF, op. cit).

(also to avoid being refused entry on the grounds of not being in possession of a visa). Following the logic of the two-tier control system, a traveller can be refused entry despite having a visa in cases when there is a change in circumstances in the period between the issuing of the visa and the presentation at the border check point.[62] Thus, at present, most of the countries practise the two-tier system of remote and actual control when deciding to grant entry to their territory.

In certain circumstances there is a possibility to waive the remote entry control by allowing certain categories of traveller visa-free entry (meaning that they are subjected to only one control as to whether they meet the entry conditions – at the border). Usually, the exception is based either on a bilateral treaty providing for visa-free travel or on obligations flowing from international agreements – in the case of refugees and asylum seekers.[63] In addition, for certain categories of persons there is a possibility to apply for a visa directly at the border without the visa requirements being waived. Such a practice is typical in the cases of transit or in cases of aliens from neighbouring countries.[64]

The practice of imposing an obligation to apply for a visa prior to travel also exists in non-immigration countries. There is also the possibility for an exception to the rule based on bilateral agreements.[65] One of the forms of cooperation based on the waiver of visa requirements for all categories of travellers and also the waiver of the requirement to meet the entry conditions is the establishment of common travel areas, resulting in the creation of common external frontiers. In these cases, the internal border controls (meaning those between the participating states) are either abolished (as in the case of Benelux) or controls are only abolished for citizens of the states participating in the regional agreement (as in the case of the Nordic states).[66]

Control at the border. Once the traveller is at the border, one of the controls to be performed would be whether that person is in possession of a visa (visa control). Such

[62] Argentina, United States, Canada, United Kingdom (data 1986, see WOLF, op. cit).

[63] Argentina, Australia, Chile, France, United States (data 1986, see WOLF, op. cit.).

[64] Norway, Poland, USSR, United States (data 1986, see WOLF, op. cit.).

[65] GDR, Italy, Austria, Greece, Switzerland, Turkey, Ireland, Israel, Yugoslavia (data 1986, see WOLF, op. cit.).

[66] Denmark, Norway, Sweden (data 1986, see WOLF, op. cit.).

a control is performed by the border guard authorities. However, as of the mid-1980s, a tendency towards the externalization or even privatization of this control developed. Wolf cites the example of Australia where in 1986 airlines and shipping companies were involved in the visa control system to a level of being liable if they disembarked a passenger without an entry visa. The privatization developed further in Europe where nowadays, based on part of the Schengen *acquis*, there are carriers sanctions[67] envisaged for the airlines that take passengers on board without the necessary visas.

The power to grant or not to grant entry resides with the border guard who performs the control at the respective border check point. His decision is taken with discretion as to the interpretation of the conditions for entry, as enshrined in the respective laws. The immigration officer has to assess in each individual case whether the various conditions the applicant has to meet correspond to the declared aim of entry and the actual objectives of the applicant.[68] In some countries, the discretionary power also includes the possibility of the administrative authority to take into consideration some elements that are not prescribed by law or in some cases even to waive some conditions that are prescribed by law and thus are normally required for the granting of entry.[69]

The administrative authority responsible for performing border controls might not have discretion where the law provides for a right of entry once the conditions for entry have been met.[70] Still, even then it is the administrative authority that has to judge whether those entry conditions have been satisfied or not.[71] According to Wolf, it is rare that a state imposes on itself the duty to admit aliens complying with all entry conditions. Such a provision could amount to a self imposed obligation to admit aliens, which is a rather controversial right, to be discussed in the context of the judicial review of the decision on entry in the next section. However, in certain cases

[67] See Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10.7.2001, p. 45–46, whose purpose is to harmonise the financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission.

[68] Australia, Canada, Israel, Japan, Poland, Switzerland, United Kingdom, United States, Yugoslavia (data 1986, see WOLF, op. cit.).

[69] Australia, Canada, Denmark, Greece, India, Switzerland (data 1986, see WOLF, op. cit.).

[70] France, Ireland, Netherlands, Nigeria (data 1986, see WOLF, op. cit.).

[71] Canada, France, Ireland, Netherlands, Nigeria (data 1986, see WOLF, op. cit.).

where there might be an obligation to grant entry it is included in administrative regulations using formulations such as:[72] "subordinate authorities are only empowered to deny entry on the ground prescribed in these regulations".[73] In most cases, the law does not foresee an automatic obligation for the authority to refuse entry once one of the prescribed entry conditions is not met. There might be an imposition of an obligation to deny entry in the cases when it is prescribed by a higher administrative authority.[74] The ultimate right to grant entry is in the hands of the higher administrative authority, usually the respective ministry. In cases such as these, entry may ultimately be granted following an administrative appeals procedure, despite the fact that entry was refused by the border guard or immigration officer.[75]

The discretionary power of the administrative authorities responsible for performing border controls is limited with regard to certain categories of travellers. This usually holds true for refugees and asylum seekers, whose rights are guaranteed by international agreements or national regulations[76]. For those privileged groups of persons, in addition to the inability of the competent authorities to refuse entry, there is the possibility to waive part of the entry requirements and the requirement to present certain documents at the border.[77]

Judicial control. According to WOLF, in most countries that participated in the survey in 1986, there was no legal remedy against the refusal to grant visas as such decisions were not considered to be subject to the jurisdiction of the national courts.[78] Even where there was a general administrative procedure applicable to all immigration matters, it was unclear whether there was any protection against a refusal of entry abroad at the level at which the visa application was made.[79] In some of the countries,

[72] Argentina, Chile, GDR, India, Ireland, United Kingdom (data 1986, see WOLF, op. cit.)

[73] Federal Republic of Germany, GDR, India, Ireland (data 1986, see WOLF, op. cit.)

[74] India, Ireland (data 1986, see WOLF, op. cit.)

[75] India (data 1986, see WOLF, op. cit.).

[76] See for example, Article 5 (2) of the Schengen Implementing Convention holds that an alien who does not fulfil the set entry condition must be refused entry "*unless a contracting party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations…*".

[77] Argentina, Chile, France, India, Ireland, Japan, Netherlands, Switzerland, United Kingdom, United States, USSR (data 1986, see WOLF, op. cit.).

[78] United States, Poland (data 1986, see WOLF, op. cit.).

[79] Argentina, France, Greece, Italy, Turkey, USSR (data 1986, see WOLF, op. cit.).

denial of entry was treated as an act of state that was not subject to constitutional restrictions or judicial review.[80] Such an approach relates to the debate about whether, under international law, an individual has a right that stems from the state obligation to admit aliens.

Within the context of European law, the European Court of Justice ruled in *Panayotova and Others*[81] that the scheme applicable to entry permits (in this case, temporary residence permits):

> must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings.[82]

In the cases where it is not the visa but entry that is refused, and especially in those cases where a valid entry visa was available, a review procedure is in place.[83]
In reality however, a judicial review consists only of a legality check or a control of compliance with procedural rules, and this is typically the case in areas where administrative authorities hold discretionary power.[84] The decision of the authorities is therefore not subject to any control as regards its substance.

According to WOLF, the types of conditions the aliens have to meet in order to be granted entry and the information they are required to provide is nearly the same in all countries.[85]

Legal framework.[86] The majority of countries, regardless of their status within the EU or the Schengen system, base their visa policy on an Aliens Act adopted by the legislature which sets out the general conditions of entry; the criteria the aliens have

[80] Austria, United States (data 1986, see WOLF, op. cit.).

[81] ECJ, Case C-327/02 *Panayotova and Others*, [2004] ECR, I-11055 and the Opinion of the Advocate General Maduro.

[82] ECJ, Case C-327/02 *Panayotova and Others*, op. cit., para 27.

[83] Australia, Canada, United Kingdom (data 1986, see WOLF, op. cit.).

[84] Argentina, Canada, France, Greece, Switzerland (data 1986, see WOLF, op. cit.).

[85] Argentina, Australia, Austria, Canada, Chile, Federal Republic of Germany, France, GDR, Ireland, Israel, Japan, Luxembourg, Netherlands, Norway, Switzerland, United Kingdom, United States, USSR, Yugoslavia(data 1986, see WOLF, op. cit.).

[86] For a recent overview see ADAM AND DEVILLARD (eds), *Comparative study of the laws in the 27 EU Member States for legal immigration, including an assessment of the conditions and formalities imposed by each Member State for newcomers*, European Parliament, (Brussels, 2008), p. 563.

to meet in order to be admitted to the territory; the types of visas and procedures for their issuance and control. All further administrative formalities are dealt with in a secondary legislation, including the adoption of lists of countries whose nationals are exempted/required to be in possession of a visa in order to be granted entry. The only exception seems to be Portugal, where the core legal act dealing with aliens is adopted by the government based on a special authorization by the parliament.

Competent authorities. Generally, the authorities involved in visa policy are from one of the following three groups: the Ministry of Foreign Affairs; the Ministry of Internal Security (Interior, Justice); and the Border Guards.

In all countries, there is a distinction made between the two visa processes – the decision to issue a visa and the issuing process itself. In all countries too, the issuing of visas is performed by the Ministry of Foreign Affairs through its diplomatic and consular missions abroad. As a rule, the consulates can also decide to issue short-stay visas, in certain cases (Belgium and Denmark, for example) only after authorization by the overall responsible body. However, even here, it is the services of the Ministry of Interior that perform the necessary database checks for 'undesirables'. In some countries (Belgium, Luxembourg, Sweden, Denmark), the decision is taken by the Ministry of Interior or a specially authorized body (e.g. the Migration Board)[87]. Once the decision is taken, the consulates execute it through the granting or refusal of visas. The involvement of the Ministry of Interior is mainly linked to the issuing of visas that entitle the holder to residence.

Border Guards have the authority to decide upon and issue visas in exceptional circumstances and the definition of these is country-specific, depending on national interests, minorities across the borders or the protection of displaced persons.

Types and number of visas. There are different types of visa which can be categorized in different ways: by length of stay, by reasons for entry (transit or not) and by category of persons (e.g. those without a passport and special visas for tourist groups). The next section will show that the Schengen states mostly issue a so-called

[87] See I. HIGGINS (ed.), *Migration and Asylum Law and Policy in the European Union*, FIDE 2004 National Reports, Cambridge University Press, (Cambridge, 2004)

'Schengen visa' (which is valid for no more than three months for the whole area) and national visas allowing for longer stays in the issuing country.

3.4. The reality of visas in Europe today

Schengen visas are by now a significant global phenomenon. The citizens of the EU have little awareness of this fact, but for the citizens of over 100 countries, including some in Europe that are in principle on the road to membership, obtaining a Schengen visa is a necessity for all travel to the EU.

Schengen visas thus have a considerable socio-economic impact. But this could not be documented previously because systematic data on the issuance of Schengen visas have only recently become generally available. The relevant data are now published on the website of the Council.[88] This section provides some overall statistics.

A first point to bear in mind is that one visa is not the same as another. There are seven different types of visa referred to in the official statistics, which can be divided into three groups:

1) Standard Schengen visa, valid for access or transit through the territory. To this category belong the so called A, or airport transit visa; the B, or normal transit visa and, most importantly, the C, or standard short-stay visa valid for up to three months, which account for over 95 % of this category.
2) A second group of national visas, comprising the type D or long-stay NATIONAL visa and the so called D+C or a NATIONAL long-stay visa valid concurrently as a short-stay visa. The latter are used mainly by Romania and Italy.
3) Finally there is a mixed group for special cases comprising two types: the so-called LTV or VTL: a visa with limited territorial validity, and the ADS type: special visas issued for members of tourist groups from the People's Republic of China.

[88] See Council of the EU, Exchange of statistical information on uniform visas issued by Member States' diplomatic missions and consular posts. The data for different years can be found under 7496/04 (data for 2003), 10700/07 (data for 2006) and 8215/08 (data for 2007).

The last two types clearly represent special cases.[89] The VTL type was meant for exceptional cases but in reality is widely used for the citizens of Macedonia (FYROM) whose passports are not recognized by Greece because of the dispute over the name of their country. Greece alone accounts for about one half of all VTL visas issued.

Table 1.2., below shows the absolute number of each type of visa issued and their relative importance. This table is based on the data published on the website of the Council (in compliance with the decision of the Executive Committee of 22 December 1994 on the exchange of statistical information on the issuing of uniform visas – SCH/COMEX(94)25). These data do not include the UK and Ireland, given that these two countries do not issue 'uniform' visas. The data below thus refers to the sum of the visas issued by 27 countries (the 27 Member States minus the UK and Ireland, plus Norway and Iceland).

Table 1.2. Number of visas issued by Schengen countries in 2007

	Total issued	% of total
A (airport transit)	80 000	0.6
B (transit)	380 000	2.6
C (normal Schengen)	11 920 000	83.8
D (long stay, national)	1 100 000	7.7
LTV	212 000	1.5
D+C	375 000	2.6
ADS (Chinese tourists)	170 000	1.2
Grand total all types	14 200 000	100

Source: Council website: http://register.consilium.europa.eu/pdf/en/08/st08/st08215.en08.pdf.

[89] They are explained on the Council website in the following way:

VTL: "The Schengen Convention stipulates that any alien who does not fulfil all the conditions for entry into the Schengen area must be refused entry, unless an issuing State considers it necessary to derogate from this principle on humanitarian grounds, on grounds of national interest or because of international obligations (Article 5(2) of the Schengen Convention). In such cases authorisation to enter is restricted to the territory of the issuing State and a VTL visa is issued."

ADS: "The Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS) (O.J. 2004, L 83, p. 14) stipulates that designated travel agencies in China can act as authorised representatives of visa applicants from the People's Republic of China who are travelling in a group. Such groups may be issued a Schengen visa, limited to a maximum of 30 days and bearing the reference "ADS"."

It is apparent that by far the most common type of visa is the C or 'standard' short term (up to three months) Schengen visa, which accounts alone for about 84 % of all 'uniform' visas issued. This type, together with the transit type, is usually referred to as a 'Schengen visa'. The two together account for 87% of all visas issued. This implies that, at least numerically, Schengen covers the bulk of visa activity in most Member States. These proportions have not changed noticeably over time.

The second most important type (in numerical terms) is the D or long-term national visa. This is usually referred to in short hand as a 'national visa'. It accounts for a little less than 8% of all visas issued.

All other types of visa are of limited numerical importance, although the LTV type is of considerable political importance to some Member States.

The number of Schengen (short-term) visas has increased considerably in recent years. Between 2005 (the earliest year with complete data) and 2007 the issuance of Schengen visas by the Schengen-15 increased by about 1.2 million or almost 20% and even more so by the non-Schengen group (increase from 3.1 to 3.9 or almost 30%). By 2007 visa issuance had reached 8 million during 2007 (for the then Schengen-15) and almost 4 million for the (as of 2007), 10 Member States that had not yet lifted border controls.

Table 1.3. Issuance of C (short-term) visas in millions

	2005	2006	2007	2008
Sub-total for SCHENGEN-15	6.8	7.5	8.0	8.3
Sub-total for countries NON SCHENGEN in 2007	3.1	3.7	3.9	3.2 (of which 0.9 BG and CY)
Total	9.8	11.2	11.9	11.5

Source: Council website: http://register.consilium.europa.eu/pdf/en/08/st08/st08215.en08.pdf.

These numbers show that EU visa policy affects millions of individuals. Moreover, the data also show that visas were more important for the new Members States than the old ones. In 2007, that is, prior to their accession to Schengen, the new Member States issued about one half as many visas as the Schengen 15 (3.9 million against 8

million). However, the ratio in terms of population is about 3:1 (330 million for the Schengen 15 versus 103 for the non-Schengen). The new Member States thus issued about one half more visas per head of population (3.8 per hundred) than the old Member States (which dominate the Schengen 15 group) which issue only about 2.4 per hundred. This difference in the importance of visas may account for the tensions between old and new members on a number of issues – as analyzed in Chapter 7.

The data for 2008 also show that the concerns of the new Member States about the restrictiveness of the Schengen regime had some merit. All the new Member States from Eastern Europe which had joined the EU in 2004 joined the Schengen space in December 2007. The last column of Table 1.3 shows that this group experienced in the following year (2008) a strong decline in the number of short-term visas issued. In 2008 the short-term (Schengen) visas fell by over 30 % in the nine new Schengen Member States (but rose slightly for Bulgaria and Romania, the only continental EU Member States then still outside Schengen). This is clear evidence that the decline in visa issuance during 2008 was not due to the onset of the economic crisis, but a consequence of the Schengen regime.

The issuance of long-term (national) visas has remained less frequent. Their numbers have been stable at around 1 million until 2007. Table 1.4 shows the relevant data. It is also apparent that until 2007 the new non-Schengen Member States issued relatively fewer long-term (national) visas than the Schengen Member States. This was to be expected as long-term visas are related to persons wishing to immigrate, study or take up work. On all these counts the older, Member States are of course the more popular destinations with the result that until 2007 almost all D visa were issued by the old Member States (mainly for overseas visitors). This changed drastically in 2008, i.e. with the accession of the nine new Member States to Schengen, which resulted in a fall of the number of short-term visas, but also a very marked increase in D visas issued by them. This sudden shift across visa categories is another example of the considerable flexibility member countries retain de facto within the legal framework Schengen.

Table 1.4. Issuance of the long-term D national visas

In millions	2005	2006	2007	2008
Sub-total for SCHENGEN-15	0.8	0.8	1.0	1.0
Sub-total for NON SCHENGEN in 2007	0.1	0.2	0.1	0.3 (of which 0.05 BG and CY)
Total	1.0	1.0	1.1	1.3

Source: own calculations based on data from Council website, op.cit.

There are other important differences among Member States involving almost all aspects such as the number of visas issued, the types of visas issued, rejection rates, etc. Not surprisingly, the largest Member States account for the bulk of issuance. The three largest (DE, FR and IT) Schengen Member States account for about 60% of the total number of visas issued by the entire group of Schengen 15 in 2007.

The average rejection rate is about 9% (in 2007 there were about 8.7 million applications, of which about 8 million were granted. But the rejection rate varies from lows of around 4% in Portugal and Italy to a high of over 16 % in Belgium.

The fees also represent considerable revenue for Member States: for the Schengen 15 the total revenue must have amounted to around €500 million annually (8 million visas times €60). With an overall total for the enlarged Schengen-24 of about 14 million, the total revenue should ultimately about €1 billion.

4. Conclusions

This chapter has traced the emergence of the modern visa through the history of the formation of the modern nation state. The visa arose as a tool to control the perceived threat from 'others' who wished to enter the national territory from abroad. Control over movements at the border is now an essential element of sovereignty. Ceding part of this control to the European level was thus naturally a difficult process that took some time, as described in the subsequent chapters.

Another consequence of visa policy being close to the heart of sovereignty was later the limited judicial control in this area (as in Justice and Home Affairs in general[90]). This chapter also provided some statistical evidence on the importance of visas and the wide differences in their usage even within the Schengen area.

The chapter also provided some evidence on the importance of visa issuance and the impact Schengen membership had on the new Member States.

[90] This is indeed an important issue and applies to administrative law in general; the continental vision of separation of powers leading to separate administrative tribunals to review administrative acts.

CHAPTER 2 – THE CONCEPT OF THE TRANSFER OF SOVEREIGNTY IN THE EU CONTEXT

This chapter provides a concise overview of current legal thinking on the three themes that run through the entire study: the transfer of sovereignty, accession and relations of the European Union with third countries. It is not an attempt to engage in a debate on legal theory; it merely serves to introduce the main concepts of the terminology used throughout the rest of the study.

The chapter starts with a discussion of the effect of the transfer of sovereignty on the allocation of competences between the EU and the Member States in general. Then it moves on to look at the specific challenges that an acceding Member State might face with regard to the transfer of sovereignty. Next, it looks at the particular difficulties inherent in the visa policy field for Member States, both for those present and those acceding. Finally, some reflections on the process of Europeanization of visa policy are offered.

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon. The need to distinguish between the Community and the Union under the pre-Lisbon framework applies in particular to the present chapter. In general the term 'Community Law' is used to designate what has become 'Union Law' and the term the 'EU' or the 'Union' is used to designate what used to be called the 'Community'.

1. Transfer of sovereignty and allocation of competences

Supranational organization. What distinguishes the European Union from the other international organizations is its supranational character. Although it was created on the basis of an international agreement between sovereign states, the relations

between those states are no longer governed by international law. Instead, the relations between the Member States of the European Union, its institutions and the individuals are governed by EU law. As a supranational entity, the Union is characterized by four important elements: (1) independent institutions, which are able to act independently of the Member States in terms of their composition and manner of operation; (2) autonomous decision-making allowing the Union to take decisions by majority, but which are still able to bind all Member States; (3) the implementation of decisions either by the Union itself or by the Member States under the supervision of the Union; and (4) a separate legal order.[1]

The sovereign character of European law. The legal order created by the EC Treaty and now extended to the entire EU is separate to that of the Member States and sovereign in its own right. This sovereign character of European Union law has three main consequences: the primacy of European law over conflicting national rules, its direct effect to the benefit of individuals, and its effect on the division of competences between the Community (now the Union) and its Member States. Since only the last element is of special concern for the present study, the division of competences will be addressed in detail below.

"The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields".[2]

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[3]

[1] LENAERTS AND VAN NUFFEL, *Constitutional law of the European Union*, 2nd edition, Sweet and Maxwell (London, 2005), p. 11; referring to the European Community prior to the entry into force of the Treaty of Lisbon.

[2] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1. See pp. 47-48.

[3] Case 6/64 *Costa v ENEL* [1964] ECR 585.

Transfer of sovereignty. The Union may act only within the limits of the competences conferred upon it by the Treaties – the principle of conferral enshrined in Article 5 (2) TEU new[4]. The way in which these competences are exercised is limited by the two fundamental principles – the principle of subsidiarity and the principle of proportionality. These three principles form the basis for the division of powers between the Union and the Member States.

This approach recalls the way in which this transfer is organized in the national legal order of the Member States. The national constitutions establish the agreement on how the sovereign powers are distributed and exercised in the state, and embody the idea that no supreme power can be imposed outside the constitutionally established mechanisms.[5] The first exception to this principle was the application of international law in the internal legal order. With the creation of the European Coal and Steel Community the participating states decided to yield sovereign powers to this supranational institution. This was done on the basis of the constitutional provisions permitting limitations of sovereignty or the transfer of sovereign powers to international organizations. In most of the Member States, their constitutions regulate the transfer and contain a specific article on this issue.

It is established that membership of the European Union entails a transfer of sovereign rights to the supranational entity. The scope of those rights is regulated by the scope of Union competence in the field regulated by the Treaties. The moment at which the actual transfer occurs and, respectively, the moment at which the Member State loses the possibility to regulate in the field, determines the temporal element of the transfer of sovereignty. Thus, there can be either an initial transfer, embodied in the specific articles of the respective national constitutions, a transfer that covers all areas of Union action, or a gradual transfer that occurs following the accession to the EU as a result of a gradual adoption of EU measures in a certain field which, as a result, pre-empts further independent action by the Member States.

[4] The abbreviation "TEU" used after a Treaty article refers to the Treaty on European Union in its version until 1 December 2009, while "TEU new" refers to the same Treaty, in its version as of 1 December 2009.

[5] A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, (Cambridge 2005), p. 9.

The principle of conferral. The Union does not have its own powers; but only those conferred on it by the Treaty. Article 5 TEU new (ex Article 5 EC) enshrines this principle known as the principle of conferral or the principle of attribution of powers. Thus, Article 5 (2) TEU new provides that "*the Union shall act within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein.*" This principle must be respected in both the internal and the external action of the Union.[6] In essence, the principle raises questions about whether the European Union is competent to act in a certain field and if there is indeed a competence – what its scope is. As the case law and the doctrine on these questions developed in reference to the Community, the word "Community" is used in the following paragraphs, but the conclusions apply to the entire European Union as of the entry into force of the Treaty of Lisbon.

Existence of Community competence. The technique of attribution employed in the EC Treaty was (in most cases) highly specific.[7] Typically, a substantive provision in a specific field defined the type of action the EU is authorized to take. The relevant legal basis prescribes the decision-making procedure to be used for the exercise of this power and the legal instruments to be used.

The division of competence between the EU and the Member States is determined by the legal basis. Where the EU is not empowered to act such action falls within the residuary competence of the Member States. The first paragraph of Article 5 of the EC Treaty made a distinction between Community powers depending on their legal basis. The Community exercised "the powers conferred upon it by this Treaty" where the action undertaken fell, expressly or by implication, within one of the tasks listed in Article 3 and Article 4 of the EC Treaty and the power was expanded upon in one of the subsequent titles of the Treaty. The expression "objectives assigned to [the Community]" refered to a competence to act which did not as such follow from a Treaty provision, but appeared necessary in order to attain one of the objectives assigned to the Community by the Treaty (EC Treaty, Art. 308, now Article 352 TFEU)).

[6] LENAERTS AND VAN NUFFEL, op.cit., p. 86.

[7] WYATT, DASHWOOD, ARNULL AND DOUGAN, *Wyatt and Dashwood's European Union Law*, 5th edition, Sweet and Maxwell (London, 2006). p. 85.

Scope of Community competence. Once it is established that a Community competence indeed existed, in accordance with the principle of attribution of powers under Article 5, the question arose as to the nature of the competence conferred upon the Community; more precisely, the different sorts of legal consequences which the existence or the exercise of the Community competence may have for the national regulatory competences in the policy area concerned.[8] Depending on their relationship to the powers of the Member States, the Community competences were subdivided into exclusive and non-exclusive competences (see the second paragraph of Art. 5 of the EC Treaty and Art. 43(d) of the EU Treaty). Non-exclusive competences were sometimes referred to as "shared" (see the second subparagraph of Art. 133(6) of the EC Treaty), "parallel" or "concurrent" competences.[9]

With the entry into force of the Treaty of Lisbon, it is now the Treaty on the Functioning of the European Union (TFEU) which "*organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising of its competence*s" (Article 1 (1) TFEU[10]). Title I of the same Treaty defines the categories and areas of Union competence.

Exclusive Union competence[11]. In these areas regulatory authority belongs to the Union alone: the Member States have lost the right to act autonomously. However, exclusive Union competence constitutes very much the exception; most EU powers are non-exclusive. There were only four uncontroversial cases of exclusive competence prior to entry into force of the Treaty of Lisbon: the regulation of external trade under the common commercial policy, the conservation of marine biological resources, customs union and monetary policy (for those Member States which have adopted the euro).[12] Article 3 TFEU now lists five areas: customs union; the establishing of competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation

[8] WYATT, DASHWOOD ET. AL., op. cit., p. 85.

[9] Adapted from LENAERTS AND VAN NUFFEL, op. cit., p. 86.

[10] The abbreviation "TFEU" used after a Treaty article refers to the Treaty on the Functioning of the European Union, while EC refers to the Treaty establishing the European Community in force until 1 December 2009.

[11] Areas of exclusive competence are defined in Article 3 of the TFEU.

[12] WYATT, DASHWOOD ET. AL., op.cit., p. 85.

of marine biological resources under the common fisheries policy; and common commercial policy.

The principle that any action by a Member State in a field of exclusive Union competence is a priori in conflict with the Treaty can also cause problems. For example, if the EU does not act, necessary measures may remain untaken. Furthermore, changed political and economic circumstances may make action on the part of Member States desirable. This is why it has been argued in relation to the European Community that the exclusive character of a Community competence should remain limited to what is essential in order to attain the objectives of the European Community.[13]

Another specific case arises if the EU decides, in an area of exclusive competence, to delegate certain means of exercising that competence to the Member States. As a consequence Member States then act as agents of the EU pursuant to a "specific authorization". In these cases the EU must specify in what way and according to what procedure the Member States are to act.[14]

Shared competence[15]. Here, EU law recognizes that both the EU and the Member States are competent to regulate the relevant sectors; however, the actual exercise of EU regulatory power limits the scope for exercising national regulatory power with respect to the same matters. Shared competence is the normal case.[16] It applies, among others, to the legal bases of visas.

The principle of pre-emption. This applies in the areas of shared competence: so long as the EU has not exercised its regulatory competence, the Member States remain free to exercise theirs. In doing so they must, of course, comply with any general obligations resulting from the Treaty, such as in the field of free movement of goods, persons, services or capital.

[13] LENAERTS AND VAN NUFFEL, op. cit., p. 86.

[14] For a concrete example, see part II of Chapter 8 which discusses local border traffic agreements.

[15] Areas of shared competence are defined in Article 4 TFEU.

[16] Adapted from WYATT, DASHWOOD ET. AL., op.cit., p. 85.

Once the EU has exercised its (shared) regulatory competence, the room for maneouvre for Member States is even more restricted: in principle they remain free to exercise the competence – but now they must also respect the relevant EU legislation in this field. EU measures thus have the so-called "pre-emptive" effect, i.e. they occupy at least part of the relevant regulatory field, and prevent Member States from exercising their own competence therein.

In the extreme, the pre-emptive effect could be total: EU measures might completely regulate the field, thereby preventing Member States from lawfully adopting divergent national regulatory standards. From the point of view of a Member State, fully pre-emptive EU secondary legislation creates a similar situation to exclusive competence under the Treaty itself.

In most cases, however, the pre-emptive effect of EU legislation is only partial: while imposing certain obligations on Member States as to how they must exercise their own regulatory competences, the EU measure nevertheless leaves the national authorities a substantial margin of discretion to make their own independent policy choices, even within the occupied field. A typical case in point is all the Community legislation that provides for only minimum harmonization.

At the other extreme it is also possible that, in certain areas of shared competence, owing to the particular nature of the authorized activity, the actual exercise of EU competence has no pre-emptive effect at all. This could be the case in areas where measures by the EU do not take the form of regulation, but of specific actions. For example, in the fields of humanitarian aid or development co-operation, EU measures (e.g. aid to certain regions in a state of emergency) do not have the consequence of precluding autonomous action by the Member States with respect to the same subject-matter. In these fields, the competences of the EU and the Member States are perfectly parallel: the exercise of either competence leaves open the full range of possibilities for the future exercise of the other.[17]

[17] Based on WYATT, DASHWOOD ET. AL., op.cit., p. 85.

Therefore, in order to determine whether a certain competence lies with the EU or the Member States, it is necessary to determine to what extent the EU action in a particular area still leaves room for the Member States to legislate. Action on the part of the EU restricts the power of the Member States to such an extent that in future they can only act in conformity with the EU provision. Depending upon the extent to which the EU exercises its power, it may confer upon it an "exclusive nature,"[18] even though exclusive competence has not been transferred to the Community within the meaning of the second paragraph of Article 5 of the EC Treaty.[19]

However, there are still some substantial differences between the exclusive competence "by nature" and "by exercise". In areas of exclusive competence "by nature" there are rules that make the transfer of sovereignty in this field irreversible. For example, the establishment of closer cooperation among Member States in areas which fall within the exclusive competence of the EU is precluded by the Treaty.[20] Furthermore, the EU cannot transfer a field in which it has exclusive competence back to the Member States because the text of the Treaty itself categorically rules out competence on the part of the Member States.

In contrast to the definitive character of loss of sovereignty in the cases of exclusive competence "by nature", in the areas of shared competence that have become exclusive "by exercise" there can be a reversal of the transfer. The EU may in principle repeal the EU measure, leaving the Member States in a position to exercise their powers in full again. The repeal must accord, however, with the objectives of the Treaty provision forming the legal basis of the measure and with the principle of subsidiarity.[21] This possibility is confirmed by Article 2 (2) TFEU.

Relevance for the case of visa policy. As visa policy was not part of the EC Treaty from the very beginning, the attribution of powers process follows a special

[18] Opinion 2/91, Convention No. 170 of the International Labour Organisation concerning safety in the use of chemicals at work [1993] ECR I-1061, Opinion 1/94, Agreement establishing the World Trade Organisation [1994] ECR I-5267; Opinion 2/92, Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] ECR I-1759.

[19] LENAERTS AND VAN NUFFEL, op.cit., p. 86.

[20] Article 43(d) Treaty on the European Union. Confirmed by Article 20 (1) TEU new.

[21] LENAERTS AND VAN NUFFEL, op. cit., p. 86.

dynamic.[22] This process is sometimes referred to as Europeanization, in the sense of shifting regulatory powers from the national to the European level.

In practice the process began with the inclusion of a special provision in the EC Treaty allowing for Community action. In the case of visa policy, this occurred with the entry into force of the Maastricht Treaty, which contained the special provision of Article 100c. It referred to two very specific powers: visa list and visa format. The attribution of power on these two issues also had provisions with regard to the decision-making process of the exercise of power and the types of act that could be adopted in the process.

When the first Community acts were adopted, the Community exercised its competence, and thus occupied the field and limited the exercise of regulatory powers by the Member States. However, the field was not occupied completely, as the adopted Community acts already foresaw several exceptions residing in the regulatory powers of the Member States.

With the entry into force of the Treaty of Amsterdam, a wider range of issues linked to visa policy was subjected to Community rules. The gradual process of the transfer of sovereignty therefore repeated itself. The first step was the inclusion of a specific reference to visa policy in an EC Treaty article or articles. This act in itself creates the possibility for Community action and for the potential limitation of Member States' competences. The second step involved the adoption of a Community act in the exercise of conferred powers. By the simple act of adoption, the Member States' competence to regulate the field actually decreases. Moreover, even within the limited scope still left open to them, they are constrained by the obligation not to adopt acts that contradict Community rules.

Thus, the more the EC acted, the more sovereignty Member States transferred and the less regulatory power they have as a consequence. This process is bound to create tensions, especially in fields where the rules are strongly influenced by national

[22] For a reflection on the relationship between competence, European community law and the third country nationals prior to the Maastricht Treaty, see: R. PLENDER "Competence, European Community Law and Nationals of Non-Member States", *International & Comparative Law Quarterly*, 39 (1990), pp. 599-610.

tradition or specific external relations priorities, such as visa policy. Because, unlike the field development aid, for example, it is not possible to have the EC (and now the EU) and the Member States act in parallel; there can be only one regulator, and that is the EU.

2. Transfer of sovereignty in the EU accession process[23]

Accession and the transfer of sovereignty. As mentioned above, the transfer of sovereignty can take two forms. The first is gradual and occurs in areas of shared competence when the Community and now the Union acts and adopts community rules; it pre-empts future action by the Member States and thus limits their regulatory powers. The second is more abrupt and occurs every time a new state accedes to the EU; it transfers part of its sovereignty to the supranational entity. Usually, this transfer takes the form of special provisions, authorizing the transfer in the national constitutions of the country concerned.[24]

In essence, the founding members of the ECSC had to perform the same action and authorize the same transfer. However, while the first Member States had to accept the transfer in principle and the resulting primacy and direct effects only later, the countries joining at a later stage also had to accept the body of law created, but prior to their accession. Moreover, a Member State could participate in the adoption of Community acts through its government representatives in the institutions, and could thus make its specific concerns heard at that stage. This possibility is not open to an acceding state – it has to accept the rules as they stand at the date of its accession, subject to specific conditions agreed in the Act of Accession.

For the sake of clarity one can extract two elements in the process: the pure transfer of sovereignty and the limitation of regulatory powers, or what is known as 'competence decrease'. In this case the pure transfer of sovereignty will refer to the acknowledgement of primacy of Community law in the national legal order. And as such the substance of this transfer does not change over time. The competence

[23] Since the rules on accession have only so far been applied prior to the entry into force of the Treaty of Lisbon, the references to the Community in this section were maintained.
[24] For a detailed look at the case of the fifth enlargement, see: A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, (Cambridge 2005), p. 9.

decrease is the result of the division of powers between the Community and the Member States. Due to the ongoing process of deepening, the powers of the former have tended to increase after each subsequent accession. Thus, the countries that acceded last to the EU had to surrender a broader scope of competences than any other country before them. This applies also in the field of visa policy as will be illustrated throughout this work.

An additional element of the fifth accession[25] was the development of elaborate pre-accession machinery, which ultimately had the effect of limiting the regulatory powers of the candidates for accession long before the actual accession date. An impressive set of rules and procedures, which some authors went as far as calling "customary enlargement law",[26] has been developed around the single article in the EU Treaty governing the accession procedure - Article 49 TEU. In order to understand the precise nature of the sovereignty transfer and competence decrease upon accession it is necessary to have an overview of the three main elements of the accession process: the general legal framework and the conditions for accession, the accession negotiations and the accession treaties. A concise overview is provided below.

2.1. The legal framework of accession

The formal accession procedure. The procedure of accession is set out in Article 49 TEU which in its pre-Lisbon version reads:

> Any European State, which respects the principles set out[27] in Article 6 (1) may apply to become a member of the Union. It shall address its application to the

[25] DG Enlargement consistently treated the accessions of 2004 and 2007 as two waves of a single enlargement.

[26] See for definition, DIMITRY KOCHENOV, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law*, Volume 59 of European monographs, Kluwer Law International, 2008, pp. 63-64

[27] The Treaty of Lisbon introduced changes in the first paragraph of Article 49 TEU new which now reads :
Any European State, which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national parliaments shall be notified of this application. The applicant state shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members.The conditions of eligibility agreed upon by the European Council shall be taken into account.
The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant state. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

> Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant state. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

The text clearly outlines two tracks of the accession procedure – one, involving the Member States and a second one, involving the Community institutions. The Accession Treaty is concluded between the Member States and the applicant state and is ratified by the parties according to their individual constitutional requirements. The European Community is not a party to this international agreement[28] and the acceptance of new Member States is not an exercise of Community competence.[29] However, the Community institutions prepare the stage for the conclusion of the agreement as the latter is conditional upon the Commission submitting an Opinion, the European Parliament giving its formal assent and the Council deciding unanimously on the issue. Ultimately, the two tracks are interdependent and supplementary to each other.[30]

When looking at the text of Article 49 TEU, it is difficult to find in it the complex accession procedures witnessed during the fifth enlargement. The text simply states that application for accession is addressed to the Council, which has to consult the Commission on it. The position of the Commission takes the form of an Opinion.
In fact, in practice, there are two Commission Opinions. The first is delivered following an application for membership; it evaluates the compatibility of the country with the accession criteria and recommends to the Council to open or not negotiations for membership with the country in question. However, in legal terms this first opinion is not a prerequisite for the opening of accession negotiations.[31]

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[28] J.P. PUISSOCHET, *L'elargissement des Communautés européennes*, Editions technique et économiques, (Paris, 1974), p. 28.

[29] MACLEOD, HENDRY AND HYETT, *The External Relations of the European Communities*, Clarendon Press, (Oxford, 1996), p. 226.

[30] HOFFMEISTER, "Changing requirements for membership", in OTT AND INGLIS (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, Asser, (The Hague, 2002).

[31] AVERY & CAMERON, *The Enlargement of the European Union*, Sheffield Academic Press, (Sheffield, 1998), p. 23.

The second formal Opinion is delivered once the accession negotiations are completed. The period between the two opinions is taken up with active work on the part of the Commission, which is engaged in the process of continuous evaluation through regular reports in the framework of a 'pre-accession' strategy. The Commission is also involved in the preparation of the common negotiating positions of the Member States and assists the Presidency of the Council in the negotiation process. Thus, the discrepancy between the text of Article 49 TEU and the actual practice of its implementation has led some authors to claim that the development of a customary enlargement law is in process.[32]

Conditions for accession. From the text of Article 49, it seems that it is mainly concerned with the procedure, rather than the conditions of accession. From the first paragraph of the text, one can identify two conditions. The first is geographical, as the text speaks of a "European state". The second is linked to the principles set out in Article 6 (1), namely freedom, democracy, respect for human rights and fundamental freedoms and the rule of law. Moreover, the Court of Justice has already ruled that the Treaty provision on enlargement only sets out the procedure for the admission of new Member States but leaves it to the authorities involved in this procedure to determine the conditions of accession.[33] This interpretation and the lack of legally binding accession criteria in Article 49 led to the gradual adaptation of the conditions for accession in each subsequent enlargement.

In this sense the fifth enlargement is unique, as the accession conditions were developed into a set of accession criteria,[34] which stemmed from European Council conclusions and as such were determined unilaterally. Despite the fact that those criteria do not have a legally binding effect, their formulation and general application

[32] D. KOCHENOV, "EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?", *European Integration Online Papers* 6 (2005).

[33] ECJ, Case 93/78, *Mattheus* [1978] ECR 2203, para 7-8.

[34] The glossary on enlargement, provided by the DG Enlargement in the European Commission reads: " The accession criteria, or Copenhagen criteria, are the essential conditions all candidate countries must satisfy to become a Member State. They were set at the Copenhagen European Council in 1993 and at the Madrid European Council in 1995", see: http://ec.europa.eu/enlargement/glossary/terms/accession-criteria_en.htm

has given them a 'quasi-constitutional' nature.[35] Thus, the basis of the accessions of 2004 and 2007 and the framework in which the accession negotiations develop now with Croatia and Turkey are based on the so-called Copenhagen criteria, stemming from the Presidency Conclusions of the Copenhagen European Council of June 1993.

The geographical criterion. The requirement for an applicant state to be European has been part of the accession procedure and requirement since the Treaty of Rome.[36] However, the issue of whether a country is European enough for membership arose only once before the Turkish application for membership. Thus, the application of Morocco was refused by the Council in 1987 on the grounds that Morocco did not meet the geographical criteria for membership.[37]

The issue gets more complicated in relation to countries which undoubtedly belong geographically to the European continent, but somehow are not considered part of the European family. In order to solve this difficulty, different criteria have been applied. One of them is the membership of the Council of Europe, which although it can prove a certain adherence to a set of democratic values, nevertheless still includes countries such as Azerbaijan; not seriously considered as a potential EU Member State. Thus the membership of the Council of Europe is necessary but not a sufficient condition when the European character of a candidate is being evaluated. In an attempt to bring some clarity to this question, the Commission tried to define this European identity as a mixture of geographical, historical and cultural elements and concluded that "the shared experience of proximity, ideas, values and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation'.[38]

The Copenhagen criteria. Based on a proposal from the Commission, the European Council gave a membership perspective to the countries of Central and Eastern Europe "as soon as they are able to assume the obligations of membership by

[35] C. HILLION, "Enlargement of the European Union: A Legal Analysis", in ARNULL AND WINCOTT (eds), *Accountability and Legitimacy in the European Union*, Oxford University Press, (Oxford, 2002), p. 412.

[36] See Article 237 of the original EEC Treaty.

[37] HOFFMEISTER op.cit., in footnote 22, pp. 91-92.

[38] European Commission, "Europe and the Challenge of Enlargement", Bull EC, Suppl. 3 (1992), 11.

satisfying the economic and political conditions required."[39] The exact conditions were then elaborated further and included: (1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) the existence of a functioning market economy as well as the capacity to cope with the competitive pressure and market forces within the Union; and (3) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. Although some of the criteria (especially the political one) have already been used in the framework of previous accessions, the fact that they were clearly defined and included in European Council conclusions led them to supplement the provisions of Article 49 and "redefine the constitutional framework for enlarging the Union".[40] By providing the candidate countries with a clear road map to accession, the Copenhagen criteria set in motion the process of "membership conditionality" which later was considered a determinant for the successful and timely completion of the necessary reforms by candidate countries, prior to membership in the EU.

The absorption capacity. The Copenhagen European Council of 1993 also included an internal criterion which had to be met prior to enlargement, namely "the Union's capacity to absorb new members while maintaining the momentum of European integration" as "an important consideration in the general interest of both the Union and the candidate countries".[41] It has generally been accepted that this was a call for institutional reform to be completed prior to the accession of the Central and Eastern European countries. However, after the latest accession and following the agreement on institutional reform, the Commission considered the need to elaborate further on this criterion. It did so in its Strategy Paper on Enlargement of the end of 2006, which defined the "absorption" or "integration" capacity using three main elements: institutions, budget and policy fields.[42]

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[39] Copenhagen European Council, "Presidency Conclusions", 21-22 June 1993, Bull. EC 6 (1993), I.13.

[40] C. HILLION, "The Copenhagen Criteria and their Progeny", in C. Hillion (ed.), *EU Enlargement. A Legal Approach*, Hart, (Oxford, 2004), p. 13.

[41] Presidency Conclusions Copenhagen European Council (21-22 June 1993), Bull. EC 6 (1993), I.13.

[42] European Commission, "EU Enlargement Strategy and Main Challenges 2006 – 2007" (including annexed special report on the EU's capacity to integrate new members), available at http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2006_en.htm.

The political criteria. The political criteria for membership can be considered as being linked to the reference to Article 6(1) TEU which appears in the Article 49 TEU. Introduced by the Treaty of Amsterdam, it refers to the EU's founding principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. However, some sort of political requirement towards the candidates for membership was already applied prior to the entry into force of the Amsterdam Treaty.[43] What was added in the case of the fifth enlargement was the inclusion of "respect for and protection of minorities" among the elements of the political criteria; next to democracy, the rule of law and human rights. The political criteria, and especially the part defined as the "stability of institutions," were used to monitor the reform of the judiciary. After all the difficulties in this particular field, notably with Bulgaria and Romania,[44] the issues of "Judiciary and Fundamental Rights" constitute a new negotiating chapter in the ongoing negotiations with Croatia and Turkey.

The economic criteria. The economic criteria, as defined by the Copenhagen European Council, are two: the existence of a functioning market economy[45] and the capacity to withstand the competitive pressure and market forces within the Union.[46] Their precise definition and the further breaking down to concrete elements whose performance can be monitored marked a new development in economic conditionality. Earlier, in the evaluation of the candidates for accession, their economic conditions were always under consideration.[47] However, the exact determination of the two elements – "functioning" and "competitive" market economy – were mentioned for the first time in the Commission's 1992 report

[43] For the practice of previous enlargements, see C. HILLION, "The Copenhagen Criteria and their Progeny", in C. HILLION (ed.), *EU Enlargement. A Legal Approach*, Hart, (Oxford, 2004), p. 13.

[44] See, among others: NOUTCHEVA, "Bulgaria and Romania's accession to the EU: Postponement, Safeguards and the Rule of Law", *CEPS Policy Brief*, n. 102 available at: http://shop.ceps.eu/BookDetail.php?item_id=1329.

[45] This includes: liberalized prices and trade; the absence of significant barriers to market entry and exit; an effective legal system which regulates property rights and allows the enforcement of laws and contracts; macroeconomic stability, including adequate price stability, sustainable public finances and external accounts; broad consensus about the essentials of economic policy; and a well-developed financial sector. (Agenda 2000, pp. 42-43).

[46] This includes: an existence of a functioning market economy with macroeconomic stability; a sufficient amount of human and physical capital, including infrastructure, at an appropriate cost (i.e. energy supply, telecommunication, transport, …), education and research; government policy which stimulates competition; trade integration with the Union; and the proportion of small firms. (Agenda 2000, pp. 42-43).

[47] See for example the cases of the UK, Greece, Portugal and Spain.

"Europe and the Challenge of Enlargement".[48] The economic criteria do not refer to income per capita as an element. In reality the difference in the income or GDP (gross domestic product) per capita between the old EU-15 and the ten candidate countries in Central and Eastern Europe constituted a key background factor. This huge difference in income and wages nurtured a fear in the old Member States that their labour markets would be swamped by migrants from the new members. Hence the old members insisted on long (7 year) transition periods for the free movement of workers. Moreover, during the negotiation period the old member countries were particularly sensitive about the issue of illegal migration and forced some candidates to take decisive action to curb this phenomenon (see Chapter 10).

The ability to take on the obligations of membership. This criterion relates to the obligation to adopt the so-called *acquis communautaire* which encompasses "the whole body of rules, political principles and judicial decisions which new Member States must adhere to".[49] Over the consecutive accessions, the term has been clarified and is now considered to include: the content, principles and political objectives of the Treaties; secondary legislation adopted in application of the Treaties; the case law of the Court of Justice; declarations and resolutions adopted by the Union; measures relating to the CFSP; measures relating to Justice and Home Affairs; international agreements concluded by the Community and those by the Member States between themselves in the field of the Union's activities.[50] However, the simple adoption of the rules would not be sufficient without structures that can apply the rules properly. Such concerns led to the definition of an additional criterion in the case of the fifth enlargement, which was later called "the administrative capacity criterion".[51]

Administrative capacity criterion. The existence of such a criterion is based on the belief that the mere existence and adoption of the EU rules is not sufficient in the

[48] European Commission, 'Europe and the Challenge of Enlargement', 24 June 1992, Bull. EC 3 (1992), Suppl., para 9.

[49] GIALDINO, "Some Reflections on the Acquis Communautaire", *Common Market Law Review*, 32/5, (1995), p. 1090.

[50] Scadplus glossary, available at: http://europa.eu/scadplus/glossary/index_en.htm.

[51] There is a disagreement in the literature as to whether the requirement is indeed a separate criterion (see: HILION, op.cit., p. 17) or a sort of procedural element of the third criterion (see: HOFFMEISTER, op.cit., p. 98). The argument for the second view is based on the understanding that the ability to take on the obligations of membership implies not only the adoption of the rules but also the existence of appropriate structures that are able to actually apply them.

absence of adequate administrative and judicial structures to ensure the implementation and enforcement of the *acquis*. This view was formally established by the Madrid European Council in 1995, which for the first time stressed that applicant countries should develop their administrative structures to ensure the effective implementation of the *acquis*. This point was later reiterated in the Presidency Conclusions of subsequent European Council meetings and included in the conclusions of the General Affairs Council on EU Enlargement. In an annex to the December 1998 Vienna European Council it is, for instance, very clearly stated that

> The transposition of the *acquis* is not sufficient in itself but must be followed by effective implementation and enforcement. Therefore the development of administrative and judicial capacities is a crucial aspect of preparation for accession and the existence of credible and functioning structures and institutions an indispensable precondition for future membership.[52]

The effects of the adoption of the acquis. The rationale behind the principle that the candidate countries have to adopt the *acquis communautaire* before accession is to ensure that they are put on an equal footing with the Member States and are subject to the same obligations as the existing Member States.[53] However, despite the fact that the *acquis* is incorporated into the national legislations of the countries concerned, the rules take on the force of European law only at the date of accession. So, it is only at the date of accession that the sovereignty to regulate the areas covered by the *acquis* will be transferred to the Community. It is also at this moment that the supranational character of the Community law will be felt.[54] If a country faces particular difficulties with this post-accession effect, it can negotiate certain exceptional or temporal derogations in the process of negotiations for membership. What is typical for the fifth enlargement, however, is that there are certain areas in which it is a priori defined that no exceptions are possible and thus the candidate countries can only either adopt the measures or abort their membership application. Such is the situation in two sensitive fields, in particular: economic and monetary union[55] and Schengen.[56]

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[52] Vienna European Council, "Presidency Conclusions", 11-12 December 1998, Bull. EU 12 (1998), Annex III, p.3.

[53] ECJ, Case 44/84, *Hurd* [1986] ECR 29, para 30.

[54] ECJ, Case C-302/04, *Ynos* [2006] ECR I-00371, para 36. and Case C-414/07 *Magoora,* [2008] ECR I-0000.

[55] "Adherence to the aims of political, economic and monetary union", as required by the Copenhagen criteria, implies that new Member States commit to further integration. (HOFFMEISTER, op. cit., p. 98).

[56] Article 8 of Protocol on Schengen to the Treaty of Amsterdam.

As a result, there is a deviation regarding the rule established by the ECJ in C-44/84; a sort of reverse discrimination. And precisely because the candidate countries have to adopt the *acquis*, they will not be subject to the same obligations as the existing (or at least some of the existing) Member States. This situation could create additional difficulties for the transfer of sovereignty and competences, as it deprives the candidate states of the possibility of flexible application that was granted to the incumbent Member States.

The "Pre-accession strategy". The fifth enlargement towards the countries of Central and Eastern Europe was not only the biggest enlargement in terms of the number of states acceding at once but also the enlargement that followed the most structured approach. The time between the application for membership and the accession date was taken up with a number of initiatives of differing legal significance and the relationships between the European Union and the candidate states were regulated by several overlapping instruments. Firstly, the Copenhagen criteria for membership were defined in June 1993. In the same year, most of the countries signed their Europe Agreements.[57] In 1994, following the Essen European Council, a "*pre-accession strategy*" was launched. It included, among other elements, a so-called structured dialogue, which in effect involved a "*structured relationship with the institutions of the Union*" and consisted of joint meetings between the Council and the associated CEECs on issues of common interest. However, the meetings were of an advisory nature and explicitly excluded the possibility of joint decision-making.

Enhanced Pre-Accession Strategy. As a tool for the support of all CEE countries in their preparation for accession, the Luxembourg European Council proclaimed an enhanced version of the pre-accession strategy.[58] The enhanced pre-accession strategy established a comprehensive legal framework for supporting and monitoring the situation in the applicant countries.[59] The three pillars of the new strategy were the Accession Partnerships, the increased pre-accession aid and the annual progress reports prepared by the Commission.

[57] See Annex 1 for the timeline of the fifth enlargement.

[58] Luxembourg European Council, "Presidency Conclusions", 12-13 December 1997, Bull. EU 12 (1998), Annex I.2.

[59] P. VAN ELSUWEGE, *EU Enlargement and the Baltic States: A Legal and Political Analysis*, PhD Thesis, University of Gent, (Gent, 2007).

Accession Partnerships. The Accession Partnerships (APs) were adopted annually for each candidate country and took the form of a Council decision, adopted by qualified majority voting in the Council. The adoption of each individual AP was based on Council Regulation 622/98 of 16 March 1998. Adopted on the legal basis of Article 308 EC, it performed the role of a basic legal act to the adoption of the individual APs. As substance, the APs included the priority areas where action was necessary for further progress towards accession and the financial assistance to be made available for the implementation of those priorities. Those areas were identified on the basis of the regular reports prepared by the Commission.[60] In essence, the APs were unilateral documents with no direct legal relationship to the candidate countries. However, in reality all candidate countries had to adopt unilateral documents in their respective national legal orders with the same content. A so-called "*National Programme for the Adoption of Acquis*" was adopted by each individual country and included a timetable and information on the administrative, institutional and financial resources for achieving the priorities and intermediary objectives set out in the APs.

Annual European Commission Reports. In addition to the idea of accession partnership, the Luxembourg European Council also requested the Commission to produce annual progress reports on each candidate country in order to monitor its progress towards meeting the accession criteria for membership. What the Commission monitored in effect were the legal measures adopted in implementation of the APs and the NPAAs, and made an evaluation of what remained in order to meet the criteria in every field. Based on the findings and conclusions of the annual reports, the Council updated the Accession Partnerships annually and likewise the candidate countries updated their NPAAs annually.

Membership conditionality. The procedure outlined above formed the basis of a phenomenon called "membership conditionality". By developing concrete conditions for membership which could be further specified and broken down into specific regulatory steps, the European Union gained enormous leverage over the candidate

[60] For further details see INGLIS, "Pre-Accession strategy and Accession Partnerships", in OTT AND INGLIS (eds.) *Handbook on European Enlargement. A Commentary on the Enlargement Process*, Asser, (The Hague, 2002), pp. 106-108.

countries. In effect, almost all political, economic and legal reforms in the candidate countries of the fifth enlargement were dominated by the requirements and priorities identified by the European institutions. "The carrot of accession and the mechanism of conditionality[61] included in the pre-accession legal instruments placed the EU in a privileged position to monitor and influence the domestic policy choices of the candidate countries".[62] As a result, even before accession, the regulatory and law-making choices of the candidate countries (and the exercise of their sovereignty in this way) were limited by the fact that they could choose policy solutions only from among those falling within the scope of European regulation.

In practical terms, the dominant role of the EU in the internal decision making of the candidate countries was exercised through a variety of procedures; chief among them were the individual assessments on the basis of the regular Commission reports. These were flanked by the Accession Partnerships coupled with conditionality in the EU's pre-accession financial instruments. Given also the differences in size, the relationship between the candidate countries and the EU was thus characterised by a growing asymmetry.[63]

The clearest indication of this evolution came with the shift from the bilateral EAs to the White Paper on law approximation and the unilateral Accession Partnerships as the main instruments of the pre-accession strategy. The White Paper on the approximation of laws illustrates two aspects of this. In the Paper, the EU lays down a long list of unilateral requirements that the candidate countries have to accept. The dominant position of the Commission in this process can be seen in the fact that it prepared this White Paper, and from the key role the 1997 Commission Opinions played in forming the starting point of the sophisticated machinery of legal conditionality and constant monitoring, which constituted the legal and political framework for the enlargement process and thus largely determined the policy choices of the candidate countries.[64]

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[61] For the effects of conditionality, see H. GRABBE, *The EU's transformative power: Europeanization through conditionality in Central and Eastern Europe*, Palgrave Macmillan, (Basingstoke 2006).

[62] VAN ELSUWEGE, op.cit., p. 203.

[63] K. MANIOKAS, *Methodology of the EU Enlargement: A Critical Appraisal*, EIPA Maastricht, available at : www.eipa.nl/Topics/Enlargement/maniokas_paper.doc.

[64] VAN ELSUWEGE, op.cit., p. 226.

This conditionality had two aspects: 'political conditionality' and '*acquis* conditionality'.[65] The first element relates to the Copenhagen criteria which were political and constituted a precondition for the opening of accession negotiations. The second element, namely the adoption and implementation of the *acquis*, only had to be fulfilled by the date of accession (but regular progress towards adoption had to be shown throughout the enlargement process). One could argue that this working method limits the EU's leverage in terms of political conditionality once the negotiations have started. Moreover, the political criteria in general are rather vague and constitute a subjective judgment of the socio-political situation in the candidate country.[66] This is different for most chapters of the *acquis* whereby the candidate countries are confronted with a catalogue of EU legislation – whose proper implementation can be verified by the Court after accession.[67]

2.2. The legal framework of EU accession negotiations

The scope of accession negotiations. The purpose of the accession negotiations is to reach an agreement between the Member States and the applicant country on the conditions of admission and the adjustments to be made to the Treaties following accession.[68] The negotiations are conducted around different chapters covering the different areas of activity of the European Union. The equal character of the negotiations has often been questioned, because the conditions of admission are unilaterally fixed by the EU and the possibility for adjustments to the Treaties are quite limited.

As mentioned earlier, the new Member States are expected to apply, implement and enforce the entire *acquis* upon accession.[69] When a country has specific concerns

[65] SCHIMMELFENNIG AND SEDELMEIER, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastren Europe", *Journal of European Public Policy*, 4 (2004), p. 669.

[66] VAN ELSUWEGE, op.cit., p. 227.

[67] HUGHES, SASSE AND GORDON, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe. The Myth of Conditionality*, Palgrave, (Basingstoke, 2004), p. 85.

[68] Article 49 (2) TEU.

[69] European Commission: *Agenda 2000- For a stronger and wider Union* (1997) EU Bull. Suppl. 5, p. 61

linked to a particular chapter of the *acquis*, it can request deviation from the rules in the form of flexible solutions in the framework of the accession negotiations. These flexible solutions generally take the form of two tools: transition periods and safeguard clauses. Both can be fixed to the benefit of either or both of the negotiating parties. Transition periods are a temporary postponement of the application of parts of the *acquis*, which is limited in scope and duration. In contrast, the safeguard clauses allow for the exemption of the *acquis* only in the case of specific events. However, as an additional proof of the one-sided character of the accession negotiations, even those instruments which under normal circumstances are available to both parties had limitations on their use imposed unilaterally by the EU. In certain cases, where there is no possibility for the use of one of the two tools, or where the implementation of the *acquis* is difficult, there is a possibility for financial assistance, as in the case of the Schengen *acquis*.

The first move on the side of the Commission towards limiting the scope of use of the transition periods was the Agenda 2000, where it stated that "the measures necessary for the extension of the Single Market should be applied immediately'.[70] Later,[71] the possible transitional measures were divided into three categories: acceptable, negotiable and unacceptable, depending on their possible impact on competition and the functioning of the internal market. When the impact was insignificant, the transitional arrangements were deemed acceptable; when the impact was more significant, the transitional arrangements were deemed negotiable but could be accepted only under certain conditions. When there was a danger that the measures could fundamentally undermine the workings of the Single Market, they were deemed unacceptable. Moreover, from the beginning of the negotiations the Commission declared that any permanent derogation would be unacceptable.[72]

Structure of the accession negotiations. The negotiations as such are conducted within the framework of an Intergovernmental Conference between the EU Member States and each applicant country. The decision to start accession negotiations is taken by

[70] Agenda 2000, op. cit., p. 61.

[71] See: European Commission, "Enlargement Strategy Paper. Report on Progress Towards Accession by each of the Candidate Countries", COM (2000) 700, Brussels, 8 November 2000, p. 26.

[72] Agenda 2000, op.cit., p. 61.

the European Council on the basis of the Opinion delivered by the Commission and certain political considerations. Following the decision on the start of the negotiations, a bilateral and multilateral screening is performed. The actual negotiations start when an applicant country presents its first 'position paper' outlining its negotiating position on a certain chapter of the *acquis*. The 'position paper' contains information about the way the *acquis* is implemented in the field of this chapter and describes the administrative capacity of the country to implement it.[73] The candidate country also indicates potential problems and/or requests transitional periods. On the basis of this information, the Commission draws up the EU's draft negotiating position. After discussion of the proposal in the Council Enlargement Working Group and the COREPER, the General Affairs Council adopts the official 'EU Common Position' by unanimity. At this point, the chapter can be 'opened' and negotiations can begin.[74]

Participants in the accession negotiations. In the framework of the intergovernmental conference, the negotiations are conducted by the respective ministers from the Member States and the applicant country. In preparation for this high level of formal negotiations there are several other layers of negotiations involving participants with decreasing levels of responsibility. They include: deputy ministers, the permanent representatives of the Member States and the chief negotiator of the applicant state. Their work is prepared by the respective working groups in the council and the negotiating team of civil servants of the applicant state.

Procedures of the accession negotiations. "When all parties agree on a common position, the chapter in question will be 'provisionally closed". The Union always reserves the right to reopen negotiations until agreement has been reached on all negotiating chapters. If compromise proves difficult on certain issues, negotiators can also decide to 'set aside' those chapters to be revisited at the end as part of a global package deal. At this final stage, negotiations will no longer respect the neat division

[73] L. MAURER, 'Negotiations in Progress', in OTT AND INGLIS (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, Asser, (The Hague, 2002), p. 120.

[74] In the accession negotiations with Turkey and Croatia, a new instrument has been introduced. In order to improve the quality and transparency of the negotiations, the European Commission prepares 'benchmarks', i.e. measurable criteria before the opening and closing of negotiating chapters. See: Communication from the European Commission to the European Parliament and the Council, 'Enlargement Strategy and Main Challenges 2006-2007', COM (2006) 649, Brussels, 8 November 2006, p. 6.

into chapters but rather focus on the horizontal balance of the Accession Treaty. If no breakthrough can be achieved within the formal negotiating structures, the European Council will be brought in to decide on the most sensitive issues. This was the case with the fifth wave of enlargement. For instance, the EU Member States decided to transfer discussions on other financial issues such as the creation of a cash-flow and Schengen facility to the end of the negotiations."[75] At the 12-13 December 2002 Copenhagen European Council, the Heads of State or Government managed to strike a deal on the cost of enlargement, which paved the way for the formal conclusion of accession negotiations and the drafting of the Accession Treaty.[76]

The experience of the fifth enlargement. The *acquis* is divided into 31 negotiating chapters (more now in the case of Croatia and Turkey). Usually, negotiations start with the so-called "easy chapter" in areas in which the Community does not have exclusive competence and as a result, the *acquis* is not extensive. Such chapters include SMEs, science and research, education and training. Usually, these chapters do not require any transition periods or safeguard clauses.

The EU's enlargement was prepared by a Joint Action concerning the evaluation of applicant States' adoption of the EU third pillar *acquis*.[77]

2.3. The Accession Treaty

Structure of the Accession Treaty. The results of the accession negotiations are enshrined in an Accession Treaty which contains the conditions of accession and the necessary adjustments to the Treaties. Although the negotiations are in a sense bilateral between the Member States and each individual applicant country, the Accession Treaty is one for every round of enlargement.[78] In practice, the conditions of accession and the adjustments are embodied in three separate documents: the

[75] VAN ELSUWEGE, op.cit., p. 235

[76] Copenhagen European Council, "Presidency Conclusions", 12-13 December 2002, Bull. EU 12 (2002), I.3.3.

[77] O.J. 1998, L 191/8 (cited in PEERS, *EU Justice and Home Affairs Law*, Oxford Univerity Press, (Oxford, 2006), p. 82.

[78] In fact, Greece is the only country that acceded to the EC alone rather than in a group ofth other countries.

Accession Treaty, the Act of Accession and the Final Act. However, according to Article 1(2) of the Accession Treaty, the provisions of the Act of Accession form an integral part of the Treaty of Accession. The Treaty itself simply proclaims that the countries involved become members of the European Union and thereby parties to the Treaties on which the Union is founded on the basis of the conditions and adjustments to the Treaties, set out in the Act of Accession. The conditions of accession include all transition periods and safeguard clauses agreed during the negotiations while the adjustments to the Treaties are of a technical nature. Any more substantial adjustments would be subject to the Treaty amending procedure of Article 48 TEU.

Legal nature of the Accession Treaty. The Treaty of Accession is an international agreement between the Member States and the acceding states. At the same time, it also has the status of primary Community law. As to its relationship with the founding treaties, Article 1(3) TA states that the provisions concerning the rights and obligations of the Member States and the powers and jurisdictions of the Union apply in respect to the Accession Treaty. This, together with the obligation of the acceding countries to accept the *acquis communautaire*, forms the basis of the continuing Community legal order after the accession of the new Member States.[79]

On the other hand, numerous provisions concern transitional arrangements and technical adjustments to secondary legislation. The Act of Accession, therefore, clarifies that the acts adopted by the institutions to which the transitional measures or amendments apply retain their status in law and can be repealed or amended on the basis of the procedures for amending those acts.[80] The details of the permanent and temporary adaptations to the acts of the institutions are included in 18 annexes and 10 protocols to the AA.[81] The Final Act, containing no less than 44 declarations from the acceding countries and/or the old Member States, supplements the Treaty of Accession and the Act of Accession. The ECJ has generally concluded that such

[79] In this respect, the ECJ proclaimed the principle that 'the provisions of Community law apply *ab initio* and *in toto* to new Member States, derogations being allowed only in so far as they are expressly laid down by transitional provisions', ECJ Case 233/97, *KappAhl* [1998] ECR I-8069, para 15.

[80] Articles 7-9 Act of Accession.

[81] As the Court declared in Austria v. Council, protocols and annexes to an Act of Accession have the status of primary law. ECJ Case 445/00 *Austria v Council*, [2001] ECR I-1461, para 62.

declarations do not have binding legal force but must nevertheless be taken into consideration for the purpose of interpreting the Accession Treaty.[82]

2.4. The legal consequences of accession

Internal consequences. The accession to a supranational entity requires the regulation of the transfer of sovereignty by constitutional means. Thus, most of the acceding states of the fifth enlargement have undertaken special constitutional amendments to tackle the general transfer of sovereignty but also other issues resulting from the accession, such as the voting rights of EU nationals in the country, as well as some amendments related to economic and monetary union.[83]

A second internal consequence related to accession is linked to the adoption of the *acquis*. As was already discussed in detail, the acceding state is obliged to adopt the *acquis* prior to its accession date. As a result, the national rules on a wide ranging set of issues are replaced by the Community *acquis*. However, there are still some rules whose adoption is postponed until the accession date. Most importantly, although the rules would have been adopted prior to accession and as such form part of the national legal system only after the accession date, those rules take the form of Community law. Although the rules would have been in force prior to accession, individuals would therefore have powers towards the national authorities based on national rather than on Community law. As a result, after the accession date, the transfer of sovereignty becomes final and the new Member State loses all possibility of action in all fields of exclusive Community competence (either by nature or by exercise).[84]

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[82] ECJ Case 192/99, *Kaur* [2001] ECR I-1237, para 23-24.

[83] For a detailed analysis see A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, (Cambridge 2005); E. KELLERMANN (ed.) *The impact of EU accession on the legal orders of new EU member states and (pre-) candidate countries: Hopes and fears*, TMC Asser press (Den Haag, 2006), p. 465; KELLERMANN AND DE ZWAAN (eds.), *EU enlargement: the constitutional impact at EU and national level*, Kluwer law international (The Hague, 2001).

[84] ECJ, Case C-366/05 *Optimus – Telecomunicações* [2007] ECR I-4985, paragraphs 25 to 33; Case C-414/07 *Magoora*,[2008] ECR I-0000; Case C-397/07 *Commission v. Spain* [2009] ECR I-0000; see also Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraph 31, Case C-186/06 *Ceramika Paradyż* [2007] ECR I-29*, paragraphs 22 and 23; Case C-261/05 *Lakép* [2006] ECR I-20*, paragraph 19 and Case C-441/08 *Elektrownia Pątnów II* [2009] ECR I-0000.

External consequences. The accession also has powerful external consequences both for the relations of the acceding state and of the EU with third states. These consequences can be divided into three main categories: legal, economic and political. Some of the consequences are addressed in the accession treaty itself or are taken over by international agreements.

Legal external consequences. As the position of the acceding state changes in relation to the third states upon its accession to the EU, there are three sets of tools that help to clarify the triangular relationships. Firstly, in the process of accession negotiations, a set of international agreements to which the EC and/or the Member States are party are included as part of the *acquis* in the Chapter dealing with external relations. As a result, the acceding state is under obligation to accede to those international agreements as well. In addition, there are a set of agreements to which the acceding state becomes a party on the accession date.

The legal consequences of previous agreements are addressed through the provision of Article 307 EC[85]. The first paragraph of Article 307 EC gives precedence in principle to "the rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries, on the other" by providing that they "shall not be affected by the provisions of this Treaty."[86] This means that national courts must ensure that non-member countries' rights under earlier agreements are honoured and the relative obligations of Member States are fulfilled.[87]

[85] Now Article 351 TFEU

[86] See Article 6 (12) of the 2003 Act of Accession; LENAERTS AND VAN NUFFEL, op.cit, p. 750-753. See J. KLABBERS, "Moribund on the Forth of July? The Court of Justice on prior agreements of the Member States (2001) *European Law Review*, 187-197, P. MANZINI, "The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law" (2001) *European Journal of International Law*, 781-792. And more recently, CH. FRANKLIN, "Flexibility vs. legal certainty: article 307 EC and other issues in the aftermath of the open skies cases", *European foreign affairs review*. 10(1) 2005 Spring, 79-115., TC HARTLEY, *The Foundations of European Community Law: An introduction to the constitutional and administrative law of the European Community*, Oxford University Press (Oxford, 2007), p. 96, R. HOLDGAARD, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, Kluwer Law International, (The Hague, 2008), p.136

[87] ECJ, Case C-10/61 *Commission v. Italy* [1962] ECR 1, paragraph 10.

The purpose of this provision is clear: in accordance with the principles of international law, the application of the Treaty should not affect the duty of Member States to respect the rights of third countries under a prior agreement (see Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraph 53; and Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145) (paragraph 33).

The second paragraph of Article 307 EC obliges the Member States to take all appropriate steps to eliminate incompatibilities between Community law and agreements concluded prior to their accession. Under that provision, the Member States are required, where necessary, to assist each other to that end and, where appropriate, to adopt a common attitude.[88]

Even potential inconsistencies between EC law and treaty obligations of individual Member States can constitute a breach of Community law.[89] Accordingly, the Member State in question must start negotiations with a view to adapting the prior agreement. If such negotiations are unsuccessful, the Member State will have, if possible, to terminate the agreement.[90] [91]

A Member State that fails to take all necessary steps to eliminate incompatibilities will be in breach of its obligations under Community law. Despite this, the application of the prior agreement will continue to be assured under the first paragraph of Article 307 EC since that provision is primarily designed to protect the rights of non-member countries.[92]

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[88] See also LENAERTS AND VAN NUFFEL, op.cit, paragraph 21.

[89] ECJ, Case C-205/06 *Commission v Austria* [2009] ECR-0000, Case C 249/06 *Commission v Sweden* [2009] ECR-0000, Case C 118/07 *Commission v Finland* [2009] ECR-0000. For first reactions see, International Legal Materials, 2009, Volume 48, No. 3, p: 470-485

[90] ECJ, Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, paragraphs 49-50 and C-84/98 *Commission v Portugal* [2000] ECR I-5215, paragraphs 58-59.

[91] However, it is equally settled case-law that the provisions of an agreement concluded prior to the entry into force of the Treaty cannot be relied on in intra-Community relations (see, in particular, Case 286/86 Deserbais [1988] ECR 4907, paragraph 18; Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraph 84; and Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 40).

[92] ECJ, Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraph 172

In the case of the 2004 and 2007 enlargements, Article 307 EC also had its importance,[93] however, in the field of visa policy and border controls, all the bilateral agreements which the candidate countries had in place were denounced prior to their accession, as will be demonstrated in Chapter 7. Thus, in this particular field, the issue of prior agreements did not arise, as there were simply no prior agreements in force at the date of accession (see in particular the local border traffic agreements, discussed in detail in part II of Chapter 8).

Economic external consequences. The accession of a state to the EC can also have economic consequences for its relations with third states. This is especially true in the case of common commercial policy, where the quotas for imports can be affected. One contentious example includes the import quotas of Brazilian beef to Bulgaria, which in absolute terms were higher than the total quota for Brazilian imports to the EU. Thus, the accession of Bulgaria caused an increase in the Brazilian quota.

Political external consequences. Unilateral or multilateral declarations can be attached to the accession treaty clarifying the position of the acceding state and the EU as a whole, on issues of political importance. Most importantly, the accession of a state requires that it become party to a number of international agreements; which in general require the explicit consent of the third parties. Achieving this consent can sometimes, lead to political difficulties. Such was the case in the extension of the Partnership and Cooperation Agreement with Russia towards the countries which joined the EU in 2004. Another difficulty stems from the fact that accession can lead to an alteration in the special relations a state previously held with a particular third country.

3. Relations with third states

Transfer of sovereignty and external relations. The problems in relations with third states do not arise directly from the transfer of sovereignty as such but from two other

[93] For the particular case of the fifth enlargement, see CREMONA, "The Impact of Enlargement: External Policy and External Relations" in CREMONA (ed.) *The Enlargement of the European Union*, Oxford University Press, (Oxford, 2003) and A. OTT AND R. WESSEL, "The EU's External Relations Regime", in S. BLOCKMANS AND A. ŁAZOWSKI, *The European Union and its neighbours: a legal appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, T.M.C. Asser Press, (The Hague, 2006)

factors: the legal personality of the EU and the division of competences between the EU and the Member States. Both will be addressed below.

Legal personality. In principle, the Member States as subjects of international law can have relations with third states and conclude international agreements with them. However, the EC Treaty granted legal personality to the European Community and as a result it also could interact with other states and conclude international agreements with them. Now, the European Union is also granated legal personality by Article 47 TEU new. In theory, it would be possible for the EU and the Member States to act independently but due to the special character of EU law, this is not always the case.

Key issues in EU external relations law. The law governing the EC's external competence is mainly developed through the case law of the ECJ. Under the original EC Treaty, the express external powers were not many; early on the Court gave a wide interpretation of the Community's implied powers, sowing the seeds for what has become known as the principle of parallelism of internal and external powers.

As with the discussions about internal competences, there are also two important legal questions here. The first is whether a given external power exists and the second is whether it is exclusive to the Community or shared with the Member States. While the ECJ has consistently answered the first in very broad terms, it has grown more cautious in relation to the second. Since Opinion 1/94 on the WTO agreements, the ECJ has interpreted many of the EC's external powers as being shared with the Member States. At the same time, it has gradually given a less expansive reading to the scope of the EC's common commercial policy.

The existence of many shared competences has led to the phenomenon of "mixed agreements", involving the participation of both sets of actors in the negotiation, conclusion, and implementation of agreements. While this has problematic consequences for international partners in terms of efficiency and visibility, it has been praised as a unique feature of the EC's federalism, and an important source of practical co-operation between the Community and the Member States.

Apart from the many areas of EC external competence, the EU in the pre-Lisbon system enjoyed external powers under the second and third pillars, in the common foreign and security policy area and the area of police and judicial cooperation in

criminal matters. Given the overlaps in subject matter between the three pillars, a range of legal issues arose. These include the appropriate legal basis for action, the proper delimitation of the scope of each pillar, and the organization of co-operation across pillars.

The ECJ has played an active role in EU international relations. It has played a key role in determining the existence, scope and nature of the EC's and increasingly the competences of the EU. It has treated international agreements (including mixed agreements) as acts of the EC that are subject to the full range of its jurisdiction. It has confirmed that international agreements are a binding and integral part of the EC legal order, and that in principle, they may enjoy direct effect. However, it has consistently ruled that provisions of the WTO Agreements may not be invoked before European courts.[94]

ECJ case law basis. The Community had treaty-making powers, which virtually extended to all agreements capable of achieving the aims of the Treaty. However, it does not have the general power to enter into all agreements directly related to the objectives of the Treaty. Instead, this power coincides – at least in principle – with the internal powers conferred to the Community. Such powers are those that are expressly provided for in the Treaty; but they may also be derived implicitly "from other provisions of the Treaty and from measures adopted within the framework of those provisions, by the Community institutions".[95] They may also be extended, on the basis of Article 308 EC, as well as following the formal revisions of the Community Treaties in sectors traditionally reserved for State sovereignty. Where the Community's internal powers are exclusive, its external powers will also be exclusive, thus supplanting the concurrent powers of the Member States both "in the Community sphere and in the international sphere".[96] However, where the Community's powers are originally concurrent with those of the Member States they also become exclusive once they have been exercised. In particular, the Court held that:

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[94] CRAIG AND DE BÚRCA, *EU law: text, cases, and materials*, Oxford university press, (Oxford, 2007), p. 168.

[95] See the *AETR* judgment of March 31, 1971, Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, para 16.

[96] ECJ, Opinion 1/75 *Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD* [1975] ECR 1355 and Opinion 2/91 *Convention No. 170 of the International Labour Organisation concerning safety in the use of chemicals at work* [1993] ECR I-1061.

> Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[97] Prior adoption of such provisions may be dispensed only if "the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules.[98]

Should the Member States be able to retain "*concurrent power, so as to ensure that their own interests were separately satisfied in external relations*", they could "*in relations with third countries, (…) adopt positions which differ from those which the Community intends to adopt and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the Common interes*t".[99]

Where the Community has exclusive powers, the problem should not even arise, because as we have seen in this instance all concurrent powers of the Member States are barred. Instead, where concurrent powers are concerned, possible interference cannot be excluded because the Member States cannot be precluded – for that whole vast area – from concluding an agreement before possible actions. Thus in these cases, the Court has taken steps to avoid any negative impact on the unity of the Union's international representation by stressing the general obligation of co-operation as much as possible, which is expressly provided for in the EC Treaty (Article 10 EC). Therefore, it has been repeatedly stated that until the Community exercises its own powers, the Member States must refrain from any measure that may jeopardize the attainment of the objectives of the Treaty and thus affect provisions already adopted or alter their effectiveness or even undermine the future exercise of

[97] See the *AETR* judgment of March 31, 1971, Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, para 17.

[98] ECJ, Opinion 2/92, *Third Revised Decision of the OECD on national treatment* [1995] ECR -521; see TIZZANO, "The Foreign Relations Law of the EU between supranationality and intergovernmental method", in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, Kluwer law international, (The Hague, 2002), p. 138.

[99] ECJ, Opinion 1/75 *Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD* [1975] ECR 1355.

Community powers. Moreover, they even have a duty to act where inertia may jeopardize the attainment of common objectives.[100]

Pre-emption of national powers. As some Treaty provisions explicitly recognized, the Community's non-exclusive external powers do not deprive Member States of the power to act externally. It follows, however, from Article 10 of the EC Treaty that:

> To the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.[101]

This means that Member States retain their powers as long as the Community has not, or only partially, exercised its (non-exclusive) powers. Where, however, the Community adopts a measure internally or internationally, the Member States should attune their international action in light of that measure. This would be the case if a Member State were to enter into international commitments falling within the scope of the Community rules, or in any event within an area which is already largely covered by such rules, even if there is no contradiction between those commitments and the Community rules. Whenever the Community has included in its internal rules provisions relating to the treatment of nationals of non-member countries or has expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those measures.[102]

> A Community measure may, however, authorize a Member State to conclude international agreements diverging from that measure. The upshot is that the extent of the Member States' international competence depends on whether or not the Community has exercised its internal and external powers exhaustively. The Member States have recognized this consequence of the judgment in the AETR case, even in those areas where the Treaty confirms their international competence in principle. In this sense, the allocation of external powers between the Community and the Member States changes with the intensity with which the Community exercises the power relating to the field in question.[103]

The test used by the ECJ to determine when an implied external competence of the EC has become exclusive and whether a certain policy area has been largely or

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[100] TIZZANO, op.cit., p. 139, footnote 3.

[101] See the *AETR* judgment of March 31, 1971, Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, para 22.

[102] See ECJ, Case 471/98 *Commission v. Belgium* [2002] ECR I-9681 (Open Skies).

[103] LENAERTS AND VAN NUFFEL, op. cit., p. 862.

completely harmonized by the Community law was broadened by Opinion 1/03, in which the Court also examined the nature and content of the envisaged agreement in order to determine whether the uniform and consistent application of Community law is affected by the envisaged agreement.[104] It goes on to state that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, in so far as the latter are known, but also of the nature and content of those rules and provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

Opinion 1/03 led to the transformation of a large part of the external competence for the conclusion of international agreements on civil law matters into exclusive Community competence. To deal with the consequences of this for numerous bilateral agreements already held by Member States in these fields, the Commission made two proposals aimed to authorise the Member States to exercise the competence on behalf of the Community and setting out a procedure as to how this should be done.[105]

On Transparency:

> The allocation of powers between the Community and the Member States in the field of external relations constitutes a purely internal matter as far as the Community is concerned. However, its changing nature makes contracting parties uncertain as to who is assuming the international obligations flowing from a given agreement. Indeed, other parties have made the conclusion of an international agreement on the part of the Community conditional upon its being signed in parallel by the Member States. It is for this reason, too, that multilateral agreements often require signatory international organizations to deposit a declaration as to the situation with regard to the internal division of powers. In

[104] Opinion 1/03 [2006] ECR I-01145, See N. LAVRANOS, CMLR 2006, vol. 43, issue 4, pp. 1087-1100 and THALIA KRUGER, "Opinion 1/03, Competence of the Community to Conclude the New Lugano Convention on the Jurisdiction and the Recognition and Enforcement of Judments in Civil and Commercial matters", *The Columbia Journal of European Law*, 2006, vol. 13, issue 1, p.189-199

[105] See, Council Regulation (EC) No 664/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations (OJ L 200, 31.07.2009, p. 46) and Regulation (EC) No 662/2009 of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations (OJ L 200, 31.07.2009, p. 25)

> such a case the Community is subject to an obligation of international law requiring it to submit a complete declaration of its competences. Where the Council authorizes the Commission to accede to a Convention, the duty to co-operate in good faith, to which the institutions are subject, requires the Council to enable the Commission to comply with the international law by submitting a complete declaration of competences.[106]

External dimension of internal policies – competence in Title IV EC. With regard to Title IV EC on "Visas, Asylum and Immigration and Other Policies Related to the Free Movement of Persons" there is, on the basis of AETR reasoning, clearly an implied competence to conclude agreements over the whole area. The EC has exercised this in its negotiation of readmission agreements of illegal immigrants, and by integrating migration issues into its overall relations with third countries. Finally, the ECJ held in Opinion 1/03 that the EC had exclusive competence to conclude the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a subject matter that is also covered by Title IV of the Treaty.[107]

Following the entry into force of the Treaty of Amsterdam, external relations concerning immigration, asylum and civil law were governed by Community law principles on external relations. EC law provides that the Community can enjoy external relations competence either expressly (by a provision such as Article 133 EC, which grants express power to the EC to adopt treaties concerning trade policy), or implicitly (as a corollary of the exercise of its internal powers). Title IV of the EC Treaty was governed by the implied powers principle.

Another question is the intensity of the power of EC external relations: it becomes exclusive, leaving no competence to Member States when Community powers over an issue are inherently exclusive, or where the EC has fully harmonized the issue internally. Otherwise, where the EC has only partially harmonized a field, the EC's competence is shared with the Member States, and most treaties within the field of shared competence are likely to be "mixed agreements", containing provisions falling within the scope of both EC and Member State power.[108] Most issues regulated by the EC, including most Title IV issues, fall within the scope of the EC's shared

[106] ECJ, Case 29/99 *Commission v Council* [2002] ECR I-11221, paras 67-71, cited in Lenaerts and van Nuffel, op. cit., p. 863.

[107] CRAIG AND DE BURCA, op. cit., p. 189.

[108] For a detailed analysis, see P. EECKHOUT, *External relations of the European Union: legal and constitutional foundations*, Oxford University Press (Oxford, 2005), chapters 3 and 4.

competence but, for example, the EC has exclusive external power over visa waiver treaties, due to the full harmonization of the visa list issued by internal EC law.[109]

Treaties concluded by the EC are binding on the Community and its Member States, and take precedence over secondary EC law, but, as a matter of internal EC law, the EC Treaty and the EC's general principles of law take precedence over treaties concluded by the Community. The Court of Justice has the jurisdiction to interpret treaties concluded by the EC, and the measures implementing them, on preliminary rulings from national court, and to enforce such treaties via infringement proceedings. It can also rule that the conclusion or termination of a treaty is invalid (as a matter of internal EC law) pursuant to an annulment action or an indirect challenge to validity through the national courts. The Court also has a special jurisdiction in relation to external relations: Article 300 EC grants jurisdiction to give an opinion on whether a planned treaty would conflict with the EC Treaty, including the division of competence between the EC and its Member States.

To date, the EC has negotiated or concluded a modest number of treaties within the scope of Title IV, although in several cases Member States have been authorized to act to conclude treaties within the scope of EC competence.[110] There is also an important external relations aspect to several Title IV subjects, leaving aside the formal adoption of treaties. Only one case has reached the Court of Justice[111]: an Article 300 case concerning the extent of EC competence over a civil law treaty, the Lugano Convention; here the Court found that the relevant Convention fell within the scope of EC external powers, as regards both the rules for jurisdiction and the rules on the recognition of judgments. It has been assumed in practice that the allocation of parts of the *Schengen acquis* to the EC Treaty gives the EC competence over such measures in the normal way. In particular, the EC has (jointly with the EU) negotiated a treaty with Switzerland on association with the Schengen *acquis*. An earlier treaty with Norway and Iceland apparently also binds the Community, although it was negotiated according to a sui generis procedure set out in the Schengen Protocol.

[109] By way of exception, Member States retain competence over issues such as waivers for transport or diplomatic staff, where the EC legislation does not fully harmonize the law.

[110] S. PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford University Press, (Oxford, 2006), p. 82- 83.

[111] Opinion 1/03 [2006] ECR I-01145

It should be reiterated that where not all Member States participate in particular internal EC legislation, the non-participating Member States are not bound by the EC's external competence in the relevant field; this principle is obviously particularly important to Title IV issues. In fact, the EC has taken the unusual step of negotiating treaties with one of its Member States (Denmark), in order to associate that State with certain pieces of Title IV legislation, despite its opt-out from most aspects of Title IV.[112]

The EC has implied external relations powers, in particular to conclude treaties, even in the absence of express external powers. The EC's external powers become exclusive if it has fully harmonized an issue in its internal law. The implications of this are discussed in chapters 3 (development of Schengen *acquis*), 5 (integration of Schengen framework of the EU) and 9 (Member States negotiating visa waiver agreements with the US).

In the area of visas and border control, apart from the special issue of the Schengen treaties with Norway, Iceland and Switzerland, the EC has concluded a treaty with China, and visa facilitation and readmission agreements with other third states[113].

Member States have also negotiated a treaty that falls within EC competence because it addresses the issue of seafarers' visas, but because it was too late to arrange for the EC to become a party to the treaty, the Council adopted a Decision authorizing the Member States to sign the treaty, effectively as trustees of the EC's external power.[114] In all these examples, it is assumed that allocation of parts of the Schengen *acquis* to the EC legal order has bestowed external competence on the EC in exactly the same way as a Community act.[115]

The Treaty of Amsterdam attached a special Protocol to the EC Treaty concerning external competence over external borders. According to this Protocol, Article 62 (2) (a) is "*without prejudice to the competence of Member States to negotiate or conclude agreements with third states as long as they respect Community law and other relevant international agreements*". This Protocol could be interpreted to mean either

[112] PEERS, op. cit., p. 83-84.
[113] See Chapter 5 and 8.
[114] O.J. 2005, L 136/1.
[115] PEERS, op. cit., p. 176.

that the EC would fail to gain exclusive external power over this issue even if it fully harmonized the internal law, or merely that Member States retain external power as long as there is no internal legislation fully harmonizing the issue. In other words, the EC's external power is not exclusive by nature, but can only be exclusive by exercise. Given the obligation to respect Community law, the better interpretation is the latter one, but it should be recalled that even where EC external powers are exclusive, the EC can always authorize the Member States to exercise some limited external powers anyway if it so chooses. In practice, there are already provisions in the Schengen *acquis* limiting Member States' competence to conclude external border treaties.[116] Furthermore this issue is relevant to the agreed Regulation on establishing a border traffic regime, which provides for common rules governing Member States' bilateral border traffic treaties, although, as noted above, the agreed text fails to make any reference to the external borders Protocol.

Special relationships. A 'special relationship' here is defined as the existence of political, economic, social, cultural or other links between a member and a candidate state of the EU and a third state. Such special links could have been legally acknowledged in an international agreement or in an act of the Community.

The issue of special relationships and the way in which EU membership affects them has been studied extensively in several fields, most notably external trade and development policy. However, in both fields the effect of transfer of sovereignty to the EU level has special legal implications. External trade is a field of exclusive Community competence. Development policy is one of the few fields for which the ECJ has stated that the exercise of the Community competences does not limit the Member States' competence as both can exist in parallel.[117]

Accession and special relationships. But what about those cases where there are special relationships but they cannot be accommodated in the accession treaty framework, because they fall within fields for which full and unconditional adoption of the *acquis* is necessary, such as visa policy? In these cases the principle of

[116] Article 136 of the Schengen Convention.

[117] ECJ, Case C-268/94 *Portugal v. Council* [1996] ECR I-6177,Case C-91/05 *Commission v. Council* [2008] I-3651

solidarity should mean that the Union tries to protect this special relationship through other means.

External recognition of the internal shift of competences. The large body of literature on the transfer of competence to the EU level briefly surveyed above seems to have almost totally neglected one important issue, namely what happens if the rest of the world does not recognize this internal development. In principle, it is clear that a transfer of competence to the European level does not have any impact on the rights and obligations resulting from existing international Treaties between Member States and third countries. The third party, for example the United States, might simply not recognize the internal EU transfer of powers and might not be willing to negotiate with the EU. This problem has not arisen in the past because most of the external competences of the Community concern economic or related issues (e.g. trade or the air traffic case mentioned above). Since the EU has one of the largest markets in the world, third countries, including the US, usually had a strong economic interest in reaching an agreement with the EU on these issues. This is probably the key reason why the rest of the world has usually recognized (at the cost of minor concessions when existing treaties had to be renegotiated) the additional external competences as they arose from case law or Treaty changes.

Visa policy might be different because it goes to the heart of sovereignty. The practical problem arises from the principle of reciprocity, as explained in Chapter 9. The US is still imposing visa requirements on some member countries (including Schengen member countries). This situation is not compatible with the principles of solidarity and reciprocity. If these principles were strictly adhered to the EU would have to put the US on the so-called visa black list. Such a step would of course be politically hazardous and the EU has so far refrained from taking it.

This particular example shows that shifting competence within the legal order of the EU is not enough to bring about a full transfer of power. The EU can take over the sovereignty from its member countries but this has also to be recognized by the global community. Chapter 9 shows that this external recognition of the transfer of competence still has to be fully achieved in the field of visa policy.

4. Europeanization of visas

LAHEV[118] reviews the various existing definitions of Europeanization. Europeanization can refer to a number of slightly different phenomena including: the development of EU-level policies and/or policy networks (e.g. Risse, Cowles, and Caporaso 2001); an increase of positive evaluations of the EU (Niedermayer 1995a); the two-way institutionalization of Europe through norms and formal structures (e.g. Sandholz and Stone Sweet 1998); top-down influences from the EU level to national systems (e.g. Ladrech 1994); policy-making patterns (e.g.Schmidt 1996; Falkner and Leiber 2003); or very broadly, the sum of all these notions (e.g. Börzel 1999). In this analysis the first definition[119] will be used and Europeanization will refer to the development of EU-level policy in the field of visas.

The shift of visa policy to the European level occurred in several phases, which will be analyzed in turn here. Two main Europeanization paths developed in parallel – the intergovernmental one and the community one. The intergovernmental path culminated in the Schengen cooperation, whose rules on visa will be studied in detail. The Community path of Europeanization includes cooperation in the visa field developed under Maastricht. And ultimately both paths merge into one in the Amsterdam Treaty, where visa policy rules are clearly situated in the Community pillar but the substance of the rules themselves is based on the results achieved within the framework of the Schengen cooperation.

Usually, the Europeanization of a certain policy field occurs when there are important economic, social or other conditions that make regulation at a higher level of governance, in this case the European one, more efficient. In the field of visa policy such a factor was the move towards an area without internal frontiers that inevitably led to a quest for cooperation and even the harmonization of an increasing number of visa policy elements.

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[118] G. LAHEV, *Immigration and Politics in the New Europe: Reinventing Borders*, Cambridge University Press, (Cambridge, 2004), p. 21.

[119] According to this definition, Europeanization is Europeanisation is "the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem solving that formalize interactions among actors and of policy networks specializing in the creation of authoritative European rules". See RISSE, COWLES, AND CAPORASO (EDS), *Transforming Europe: Europeanization and domestic change*, Cornell University Press, (Ithaca, 2001).

It was demonstrated in the previous chapter that the visa policy choices at national level are determined by the interplay of two sets of factors. The positive ones, such as economic cooperation; tourism; and cultural links push towards a more liberal and open visa policy. The negative factors such as security concerns and fears of increased immigration push towards a more restrictive visa policy. The actual policy adopted and implemented with certain legal rules is the result of the pendulum position (if we use the accepted Helen Wallace pendulum model[120]) at a particular moment in time.

One would expect that similar forces would be at play when this same policy is Europeanized. However, to adopt the same logic at the European level of regulation would be misleading. Not least because it would assume that the factors determining the policy choices at national level have the same meaning across Europe, which is not the case. While the full communitarization of, say, common commercial policy means that the factors linked to international trade have a similar meaning everywhere in EU, a phenomenon like tourism, for example, may lead to different considerations in Italy and in Luxembourg. A similar but increased divergence can be observed when the negative policy factors are concerned. It is particularly visible in the case of cultural links. While both Spain and the United Kingdom have a wide range of countries with which they have strong cultural and linguistic links, the list of those countries is different and one can imagine the difficulties involved in merging these cultural concerns into one. The same is valid if we take immigration concerns as a negative factor determining visa policy. Immigration fears are influenced by a variety of factors, one of which is the specific economic situation of a country. Thus, when different EU states face different economic challenges, their attitudes towards immigration vary. At one point in time Spain might see advantage in attracting immigrants to work in Spain, while Germany might seek to limit their numbers, and this situation is likely to change over time.

The lack of commonality among EU Member States in the factors determining visa policy leads to a complicated system of interactions when it comes to making policy choices and adopting legal acts. Thus, in the visa field, the policy pendulum is

[120] WILLIAM WALLACE, HELEN WALLACE AND MARK POLLACK, *Policy-Making in the European Union*, 5th edition, Oxford Univeristy Press, (Oxford, 2005)

actually swinging through three dimensions. In the first dimension, policy choices are made at national level depending on the national conditions at the time. In the second dimension, Member States negotiate among themselves to achieve a common understanding/meaning of the factors at European level. And finally, in the third dimension, the pendulum swings where there is interplay between the Member States and the supranational institutions to determine the most appropriate regulation level.

The complexity of the policy-making process as described above leads to certain particularities of the Europeanization process in the visa field and at the same time goes some way to explaining the choices made in law-making.

More than any other body of EU rules, visa policy rules have been created as a result of a bottom-up approach to European law-making. The EU rules on visas are not the result of a general principle agreed in the founding Treaties, whose meaning was clarified through Court rulings and whose application eventually culminated in a piece of secondary legislation, as, for example, in the field of equality between the sexes. Instead, EU visa rules were the culmination of decades of work outside the EU structures. To understand these rules it is not enough to study the rules themselves but also the processes linked to their adoption and implementation. In the visa policy field, more than in any other, the process is what counts; for the process is what reveals the search for a balance between the national and supranational; between freedom and security.

This particularity determines the method used to study the Europeanization of visa policy here – it is akin to a journey. At each stage of this journey, the aim is to identify which part of the visa policy regulation (as identified at national level) has been moved to a higher level of regulation, what the reasons were for this move and what alternative arguments were put against this proposal. The result will be a reverse pyramid showing how more and more of the elements determining visa policy come under the EU umbrella. Such an exercise is necessary because it will show the most sensitive areas for the Member States as regards the transfer of sovereignty in such a contentious field as visa policy. Those points of contention might be expected to emerge for the acceding Member States once they encounter the EU system of visa rules. Their problems may well be similar to those of the 'old' Member States in the

Europeanization process, and thus the solutions to these problems might find their precedent in previous experiences.

5. Conclusions

The aim of this chapter was mainly to describe and summarize the key concepts underlying the transfer of sovereignty in the European context and the stages and consequences of enlargement. The process of Europeanization in visa policy is somewhat different from other areas as it is not based on a development through the jurisprudence of a principle enshrined from the beginning in the Treaty. European visa policy evolved through a series of distinct legal steps, starting with intergovernmental agreements and ending with the full communitarization in the Treaty of Amsterdam.

TABLE 2.1: CHRONOLOGY OF THE FIFTH ENLARGEMENT

Country	Agreement Type	Date of Signature	Entry into Force	Application for membership	Council Consideration	Commission Opinion	1st Accession Partnership Issued	Opening of Negotiations	Date of Signature Accession Treaty	Date of Accession
Bulgaria	Europe	8 March 1993	Feb 1995	14 Dec 1995	29 Jan 1996	15 July 1997	16 March 1998	15 Feb 2000	25 April 2005	1 Jan 2007
Cyprus	Association	19 Dec 1972	June 1973	4 July 1990	17 Sep 1990	30 June 1993	13 March 2000	31 March 1998	16 April 2003	1 May 2004
Czech Republic	Europe	4 Oct 1993	Feb 1995	17 Jan 1996	29 Jan 1996	15 July 1997	16 March 1998	31 March 1998	16 April 2003	1 May 2004
Estonia	Europe	12 June 1995	Feb 1998	28 Nov 1995	4 Dec 1995	15 July 1997	16 March 1998	31 March 1998	16 April 2003	1 May 2004
Hungary	Europe	16 Dec 1991	Feb 1994	31 March 1994	18 April 1994	15 July 1997	16 March 1998	31 March 1998	16 April 2003	1 May 2004
Latvia	Europe	12 June 1995	Feb 1998	27 Oct 1995	17 July 1995	15 July 1997	16 March 1998	15 Feb 2000	16 April 2003	1 May 2004
Lithuania	Europe	12 June 1995	Feb 1998	8 Dec 1995	29 Jan 1996	15 July 1997	16 March 1998	15 Feb 2000	16 April 2003	1 May 2004
Malta	Association	5 Dec 1970	April 1971	16 July 1990	17 Sep 1990	30 June 1993	13 March 2000	15 Feb 2000	16 April 2003	1 May 2004
Poland	Europe	16 Dec 1991	Feb 1994	5 April 1994	18 April 1994	15 July 1997	16 March 1998	31 March 1998	16 April 2003	1 May 2004
Romania	Europe	1 Feb 1993	Feb 1995	22 June 1995	17 July 1995	15 July 1997	16 March 1998	15 Feb 2000	25 April 2005	1 Jan 2007
Slovakia	Europe	4 Oct 1993	Feb 1995	27 June 1995	17 July 1995	15 July 1997	16 March 1998	15 Feb 2000	16 April 2003	1 May 2004
Slovenia	Europe	15 June 1996	Feb 1998	10 June 1996	29 Jan 1996	15 July 1997	16 March 1998	31 March 1998	16 April 2003	1 May 2004

CHAPTER 3 – MOVING ONE LEVEL UP – INTERGOVERNMENTAL COOPERATION ON VISAS IN EUROPE

The starting point for all cooperation on visas is of course the political will to facilitate the economic, political and social contacts with neighbouring countries. Visas and other control measures that exemplify sovereignty at the border then become obstacles. When the aim to facilitate the free movement of persons becomes paramount, a process of lifting these obstacles then gains momentum in those states that are inclined to strengthen ties.

The first step in this process is the lifting of visa requirements, where the state voluntarily surrenders the possibility of control at a distance for those wishing to enter its territory. The individual will still be checked when crossing the border, however.
A second step on the trust journey of a state is the acceptance of simplified border controls for the nationals of the other state, necessitating internal identification documents rather than the usual travel documents. This second step implies the mutual recognition of the documents of the other state. A further step is the abolition of controls on own nationals while at the same time maintaining controls over the third country nationals entering the territory.
The final level is the abolition of border controls altogether. However, this entails the regulatory 'merging' of their territories as one for the purposes of external border controls and a number of measures linked to this. Among them the most significant measures are linked to visa policy, common rules on the persons not to be admitted to the common territory, and certain readmission rules.

This chapter starts by looking at three regional initiatives involving a limited number of countries, namely the Benelux travel area, the Nordic Passport Union and the free travel area between the United Kingdom and Ireland. This is followed by a study of several initiatives that prepared the ground for Schengen. These initiatives, outside the EC framework but involving Member States, took the form of a passport union that was popularized in the mid-1970s, and the intergovernmental working groups, mostly

active in the 1980s. The main body of this chapter focuses on the most elaborate example of regional intergovernmental cooperation on visas, namely the Schengen area.

Throughout, the focus is on visa policy and its various elements as identified in Chapter 1 of this study, but it is studied here in a wider context.

1. Historical examples of regional travel areas in Europe

Closer economic and social links between neighbouring countries (provided they are on friendly terms) inevitably demand some facilitation of the controls on persons travelling between them. Following the Second World War several regional travel areas emerged which, to varying extents provided freedom of movement to persons on their territory. However, the conditions under which the need for cooperation emerged and the substance of this cooperation varied according to a number of factors. Here, three examples of regional cooperation are studied from a comparative perspective: 1) the Benelux travel area, 2) the Nordic Passport Union, and 3) the United Kingdom and Ireland travel area. Although the three areas developed differently they can be usefully compared along several lines:

- the core objective of the cooperation and how visa policy was seen in that context;
- the legal basis of the cooperation;
- the beneficiary of the simplified rules – only for nationals of the participating states or also the third-country nationals residing on their territory?
- the rights of third country nationals admitted for short stay;
- the visa policy – is there a common visa list format and are there common conditions for admission?

1.1. BENELUX[1]

1.1.1. Early cooperation

Belgium, the Netherlands and Luxembourg have a long tradition of arrangements to stimulate and facilitate free travel within the area. Before the Second World War, a system of regional travel existed in the Benelux area which allowed the citizens of those countries to cross the borders between them with only the presentation of an identity card.

After the end of the Second World War and before the establishment of the Benelux Economic Union in 1958, a series of bilateral agreements was signed between Belgium and Luxembourg, Belgium and the Netherlands and Luxembourg and the Netherlands, aimed at facilitating travel among all three countries.[2] The agreements generally regulated the types of documents that were acceptable for the border crossing of nationals from one of the countries into the territory of another. Those documents included, in addition to national passports, national identity cards issued by the contracting parties, and certain types of aliens' identity cards.

An interesting solution for the facilitation of the limited border traffic was an Agreement for the Liberalisation of Minor Frontier Traffic, signed between Belgium and the Netherlands on 26 March 1953[3]. According to the provisions of this agreement, citizens of both countries could cross the border if they held either a national identity card, a passport (either valid or expired in the last five years) or another proof of citizenship. Interestingly, the agreement also stipulated that the border crossing could also take place anywhere other than just at the designated

[1] For early analysis see Chapter 10 of the book of D. TURACK, *The passport in international law*, Lexington books, (Lexington, 1972), pp. 89 -100.

[2] See for example for the relations between Belgium and Luxembourg: Agreement on the Reestablishment of the Freedom of Movement of Persons, signed between Belgium and Luxembourg in 1945; Supplementary to it the Agreement of 1949; Agreement on the Freedom of Movement of Persons from 1950; and for the relations between Belgium and the Netherlands: Agreement on the Abolition of the obligation to carry a passport for travel between the two countries of 1950; Agreement for the Liberalization of Minor Frontier Traffic; Agreement Relative to the Removal of Undesirable Persons from 1958; as well as various bilateral agreements dealing with particular categories of travellers: seamen, refugees. Prior to the establishment of the Benelux Economic Union, the most significant trilateral treaty was the Labour Treaty of 1956.

[3] United Nations, *Treaties Series*, Vol. 165, p. 297

border crossing points; a right initially limited to the period between sunrise and sunset but modified in 1955 to mean any time of day.

1.1.2. Benelux Economic Union

The Benelux Economic Union was established based on a Treaty signed in The Hague on 3 February 1958. Article 1(1) includes the free movement of persons between the elements of the economic union to be established by the participating states. Article 2 foresees the possibility for nationals of each Member State to freely enter and leave the territory of the other Member States, indicating treatment equal to that of the country nationals as regards freedom of movement, residence and establishment. In order to put this provision into practice, Article 55 of the Treaty provided for the conclusion of a convention

> determining, in the interest of public order, public security, public health or morality … such provisions which may be applied to nationals of the High Contracting Party in the territory of another High Contracting Party with regard to their entering or leaving its territory, and to their freedom of movement, of residence/sojourn and of establishment therein, and to their expulsion.

The Convention, implementing Articles 55 and 56 of the Treaty Instituting the Benelux Economic Union, was signed on 19 September 1960. It established the principle that nationals of the Member States could enter the territory of another Member State on presentation of a valid identity document to be determined by the Benelux Council of Ministers. These documents were generally considered to be the national passports and identity cards of the Member States. However, in addition there were numerous other documents that could guarantee entry, some of which also served as proof of nationality while others were not valid for this purpose. In addition, Benelux nationals had the right of residence in the other countries of the Union under the conditions of having adequate means and proof of character (absence of criminal record).

1.1.3. Freedom of movement – detailed provisions

What is more interesting for our analysis is how the entry conditions were organized for the non-nationals of the Benelux countries. Unlike the Nordic approach, the

Benelux countries first concentrated on the establishment of common external border controls, and only then on the liberalisation of internal travel. On 11 April 1960 a Convention was signed concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory.[4] The Convention entered into force upon ratification on 1 July 1960. According to Article 2 of the Convention, it established the Benelux countries as a single unit for the purpose of entry and exit controls. The controls at the internal frontiers were abolished and thus both Benelux nationals and non-nationals could enjoy free movement among the three states. The implementation of border controls was relocated to the external frontier of the Benelux Union and presentation of travel documents was required only at that point. The control executed there was valid for the entire Benelux territory and the officials who executed it did so not only for their own countries but also for the two other Benelux partners.

Undoubtedly, such an enterprise requires what TURACK calls a "*unification of administration, harmonization of national legislation and a common policy taken by the three governments*". However, as demonstrated below in the case of the Nordic countries, such a system could also function when based on mutual recognition and trust, rather than harmonization.

Without going into the details of the regulation, only certain elements that are pertinent to the further analysis will be considered. Common rules were established in various fields, and these served later as a model for the Schengen group. As far as visas are concerned, a common Benelux visa was created by the Convention, valid for a stay of up to three months and issued by any of the consulates of the Benelux states (Art. 4). In the case of an agreement with a third country featuring issues of the free movement of persons, the Benelux countries agreed to apply the most liberal application adopted by any of them.[5] In addition to the harmonized visa policy, common rules governing entry conditions and the documents were developed (Art. 5

[4] Convention entre le Royaume de Belgique, le Grande-Duché de Luxembourg et le Royaume des Pays-Bas, concernant le transfert du contrôle des personnes vers les frontières extérieurs du territoire du Benelux, signée à Bruxelles, le 11 avril 1960. Moniteur Belge, 01/07/1960, [Convention between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Netherlands concerning the transfer of control on persons to the external borders of the Benelux territory].

[5] As will be demonstrated later, the approach chosen by the Schengen group was exactly the opposite; in the case of different rules regarding a third country's nationals, the most restrictive application was chosen. See section 3.3.2. of this chapter.

and 6). The list of undesirable persons who could not be admitted to the Benelux territory was also common and a special procedure applied for the inclusion of persons on this list (Art. 10).[6] There were also readmission arrangements in case of entry of undesirable non-Benelux nationals from the territory of one of the Member States to the territory of another (Art. 9). The free movement was also extended to the non-Benelux nationals legally resident in one of the three countries who could travel on presentation of a valid residence card (Art. 8).

The coordination of the process was performed by a Working Party composed of representatives of all Benelux Ministries of Foreign Affairs and Justice and in addition, of representatives of the Minister of State for Luxembourg and the Minister of Interior of the Netherlands. Finally, the reestablishment of border controls was allowed for reasons of national security or public order, which also included public health (Art. 12).

The Benelux system of the free movement of persons, although similar to the Nordic Passport Union, used different measures to achieve the same result. Probably due to the different administrative systems and residual cultural differences, the Benelux travel area could only be achieved following the harmonization of all provisions related to entry and exit controls. Such an approach inevitably resulted in the development of a complex system of regulations, as every single aspect remotely linked to the movement of persons had to be discussed and a common agreement ultimately reached. Despite its relative complexity and due to the fact that this was one of the examples of the creation of a space without internal frontiers among countries with close, but still different, legal and administrative traditions, the experience of the Benelux countries later constituted the basis for the Schengen area, which involved even more cooperation in the free movement of persons among a wider range of countries in Europe.

The Benelux travel area grew out of long-lasting cultural and political links among the states concerned and was created within the framework of a wider economic cooperation where the free movement of persons was a natural continuation of the

[6] Possibly the precursor of the SIS.

economic integration. The Agreement on the establishment of common controls on the external borders put in practice the proclaimed objective of free movement in the context of wider Benelux economic cooperation.

1.2. Nordic Passport Union[7]

1.2.1. Early cooperation

The cooperation between the Scandinavian countries on movement of persons issues has a long history. Before the First World War, as elsewhere in Europe, there was complete freedom of movement without the need to show identity documents. Even later, when more restrictive practices were introduced elsewhere, for the period between 1929 and 1939, the nationals of Denmark, Finland, Iceland, Norway and Sweden could travel among those states without the need to present a passport. As a first step towards free movement, immediately after the end of the Second World War, all visas for travel among the Scandinavian states were abolished (with the exception of Finland). The modern objective of freedom of movement was set in 1951 by the Scandinavian Inter-Parliamentary Committee, which proposed a return to the movement without identity papers among the Scandinavian states.

As a response to this political initiative, a series of multilateral international agreements was signed in the period 1952-1957 foreseeing more and more elaborate cooperation. The first agreement was a protocol dated 14 July 1952, concerning the abolition of passports for travel between Denmark, Finland, Norway and Sweden. The provisions of the protocol exempted the citizens of these countries from the need to show travel documents for entry and short stay (not requiring a residence permit) on the territories of the other signatory states. On the same day, possibly as a

[7] For an early analysis see Chapter 9 of the book by D. TURACK, op.cit., pp. 81-88. For more information on the Nordic cooperation in general, see F. WENDT, *Cooperation in the Nordic Countries*, Nordic Council, (Stockholm, 1981) and TURNER AND NORDQUIST, *The other European Community: integration and co-operation in Nordic Europe*, Weidenfeld and Nicolson, (London,, 1982). For the movement of persons aspects see: J. VEDSTED-JANSEN, 'Abolition of Border Controls within the Nordic Region and Security of Residence in Denmark', in GUILD AND MINDERHOUD, *Security of Residence and Expulsion Protection of Aliens in Europe*, Kluwer Law International, (The Hague, 2001).

compensatory measure, an agreement was signed, on the readmission of aliens who had illegally entered the territory of another contracting party.

The second agreement regulated rules on residence. The protocol of 22 May 1954 had the same signatories as the previous agreement (Denmark, Finland, Norway and Sweden) and dealt with the exemption of the signatories' nationals from the obligation of possessing a passport or residence permit while residing in a Scandinavian country other than their own. Thus, following the entry into force of this protocol it was possible for the citizens of the four signatory states to both enter and reside (without limitation in time) in the territory of the other states, without the need for travel documents. However, in this context a travel document was seen as a document allowing international travel and, in the majority of cases, meant a passport.

At this stage, however, despite the abolishment of requirements for the presentation of travel documents, border controls, both internal and external, were still maintained. In practice, this meant that at the external frontier of the Nordic area, both Scandinavian and non-Scandinavian nationals' passports were controlled, meaning that they needed to present a valid travel document. The internal border controls, those from one signatory state to another were also maintained. However, at these border crossings, Scandinavian nationals were not required to present a passport, while other nationals needed to do so. This system was possible in practice through the implementation of two separate corridors for border controls; a system used later in the implementation of another 'free from internal frontiers area' – the Schengen space.

1.2.2. Nordic Passport Union

The third agreement, leading in practice to the creation of a common travel area and the abolition of control on the internal frontiers, was the Convention of 12 July 1957, concerning the waiver of passport control at intra-Nordic frontiers. It was also signed by the four countries involved in this cooperation – Denmark, Finland, Norway and Sweden. The objective of the agreement was the achievement of a passport union, a single travel area. The agreement transferred the passport controls to the "outer Nordic frontier". It was defined as the border between one of the signatory states and

a non-signatory state.[8] The abolition of controls on the internal borders resulted in extension of the free movement rights to legally resident aliens, as in effect their movement could not be controlled once the border controls were abandoned.
Additional elements of the system created also included:

- entry and exit control cards that non-Scandinavian travellers, who were required to have visas, had to fill in at arrival and departure;
- the compilation of lists of prohibited persons to notify the border crossing points
- a two-gate system for Scandinavian and non-Scandinavian travellers was maintained
- a common policy allowing for entry based on ID cards instead of passports maintained towards France, West Germany, Switzerland, Luxembourg and Austria.

According to TURACK, the passport union created by the Scandinavian countries can be considered as the first regional passport union. The construction of the passport union was hinged on two levels. The first involved liberalising the travel of nationals of the participating countries to move between those countries, extended further to cover nationals, as well as the legally resident third country nationals. The second level involved the transfer of the border controls personnel to the external borders of the entity. The sequence of the two levels was a result of the initial objective that put the integration plan in place; namely, the complete freedom of intra-Scandinavian travel without identity papers.

The first level was achieved on the basis of the waiver of passport requirements, while the second required the development of a common policy and the harmonization of national laws. However, this harmonization did not go so far as to include either common visa lists or the development of a common Nordic visa (at least until 1972). Each of the Nordic countries maintains its own policy with regard to visas. Thus an example was created of a passport union and an area without internal frontiers which functioned well without the harmonization of visa policies. However, this was only

[8] As such border crossing points were considered not only those on land, but also airports or sea ports where aliens coming from a non-contracting party would be expected to enter.

possible due to a certain level of trust among the participating states, allowing them to accept aliens who had been issued visas by other countries and authorities.

1.3. The Common Travel Area between the United Kingdom and Ireland[9]

The third regional free travel area under discussion here is the one shared by the United Kingdom and the Republic of Ireland.[10] In contrast to the two other areas, the Common Travel Area is not based on an international agreement or convention in the classic sense. The intention is again to have an area in which people can travel without frontier controls, but in contrast to the Benelux and Nordic approach, the goal in the case of UK and Ireland is achieved through administrative arrangements between the respective authorities (or the Home Office and the Irish Ministry of Foreign Affairs respectively) which are then implemented through pieces of parallel domestic legislation in the UK and Ireland respectively. In effect, this is a case of the alignment of policies and legislation, rather than harmonization.

1.3.1. Early cooperation

The first common travel area was established immediately after the foundation of the Irish Free State in 1922, based on a co-operation between the British Home Office and the Irish Ministry of Home Affairs. The main elements of the agreement provided that:

- each state would enforce the other's conditions of landing for aliens;
- the British suspect index and circulars relating to aliens would be provided to the Irish authorities;
- aliens who moved between the two states would be subject to at most minimal registration requirements; and
- each state would enforce the others deportation decisions.

[9] For a comprehensive analysis of the Common Travel Area, see B. RYAN, "The Common Travel Area between Britain and Ireland", *The Modern Law Review*, vol. 64:6, November, (2004). For a detailed account of British law on entry, see N. ANDREW, 'The Common Travel Area', in Guild and Minderhoud, *Security of Residence and Expulsion Protection of Aliens in Europe*, Kluwer Law International, (The Hague, 2001).

[10] Formally the Common Travel Area comprises the United Kingdom (i.e. England and Wales, Scotland and Northern Ireland), the Channel Islands (i.e. the two bailiwicks of Guernsey and Jersey), the Isle of Man and the Republic of Ireland.

A transposition of the rules into the national immigration legislation allowed for the mutual introduction of the general rule that an alien arriving from one of the two states would not require leave to enter. Unrestricted movement between the two states continued until the Second World War.

The legal basis of the modern common travel area lies in an exchange of letters between the Home Office and the Irish Department of Justice in early 1952.[11] The objective was "to follow a similar immigration policy, to set up a similar system of immigration controls, and to agree that any alien who … got into the other country would be accepted back if the second country did not want him to stay".[12] The substantial part of the cooperation provided that:

- each state would refuse leave to land to persons in transit to the other state whom "it was satisfied that for any reasons … would not be allowed to land in the other country";
- the two states were to notify one another of any action taken in relation to persons on the other's list of undesirable aliens;
- the two states were to readmit aliens who, having entered the other state through their territory, were not permitted to remain there.
- a single index of entry and exit of the two states could be maintained.

Thus, following these arrangements, Britain abolished immigration controls on travel to Great Britain from the island of Ireland in April 1952, through repeal of the requirement for aliens to obtain leave to land if their journey was from Ireland. The following year, the term "common travel area" was mentioned for the first time in the changes in the British law on aliens.

1.3.2. The common travel area in law

According to RYAN, the reasoning behind the introduction of this arrangement was based on the UK consideration that "the extension of immigration control to Ireland

[11] For a detailed analysis see RYAN, op.cit., p. 858.

[12] Under-Secretary of State for the Home Department, Geoffrey de Freitas, HC Deb vol 478 col 847 28 July 1950, cited in RYAN, op.cit., p. 858, footnote 25.

was thought impossible – firstly, because "*no effective control over that border is possible, and … control of the main roads and railways would cause great inconvenience to the inhabitants of Northern Ireland*" and because it was considered politically unacceptable to introduce permanent immigration controls between the island of Ireland and Great Britain.

Although based on administrative arrangements, the common travel area has been manifest in various ways in British and Irish law. For the purposes of this study of special interest are the provisions related to the admission of foreigners to the common territory, or, as in British immigration law terminology – the leave to enter. Within British immigration law, the following three kinds of permission can be identified: entry clearance, leave to enter and leave to remain. For the purpose of this study, only the first two categories are of relevance.

Entry clearance is permission to seek entry to the United Kingdom and is obtained prior to departure. It can take the form either of a visa (for visa nationals) or an entry certificate (for non-visa nationals). When entry clearance is required, it is obtained from entry clearance posts around the world. Leave to enter the United Kingdom is ordinarily issued by an immigration officer at the port of entry, and usually only in cases where entry clearance is not a requirement. Since 2000, entry clearance in itself legally confers leave to enter. It is however possible for this leave to be cancelled upon arrival at a UK port of entry. Leave to enter is usually for a limited period.
As in the regulation of the whole common travel area, the provisions making the system work are not common but are to be found in the British and Irish national laws on entry.

British law provisions

Under the British legislation and more precisely Section 1(3) of the 1971 Act "*arrival in or departure from the United Kingdom on a local journey from or to any of the Islands or the Republic of Ireland shall not be subject to control under this Act*", and goes on to state that "*in this Act the United Kingdom and those places … are collectively referred to as "the common travel area*". The effect of section 1(3) is to establish a presumption that no-one travelling from Ireland must obtain leave to enter Britain, as would otherwise be required under Section 3 of the 1971 Act.

The general principle that those arriving from Ireland do not require leave to enter is however subject to a number of exceptions.

Some individuals do not have a right to enter without leave:

- those with a deportation order against them;
- those to whom leave to enter has previously been refused (and has not been subsequently granted);
- those who have been excluded from Britain on the grounds that this is "conductive to the public good".

Leave to enter is also required by certain categories of persons:

- visa nationals;
- those (other than Irish nationals) who travel by air from Ireland, having commenced their journey outside the common travel area, but who were not given "leave to land" in Ireland;
- those who entered Ireland unlawfully from outside the common travel area;
- those who enter Ireland from another part of the common travel area which they entered unlawfully or where they have remained after expiry of their leave.

While the purpose of these exceptions is to ensure that British immigration requirements cannot be avoided by entry through Ireland, it may be harsh in individual cases, since it could be difficult in practice to obtain leave to enter from Ireland.

British law places automatic conditions upon the right to remain of persons arriving from Ireland, apart from Irish nationals and those with a right of abode in Britain. In the usual case, the right to remain is:

- limited to three months; and
- an individual may not engage in employment or occupation for reward unless they are a European Union national.

However, if the individual is a visa national with a 'short stay' visa, they may only stay for one month and must register with the police. In addition, if an individual's

right to remain expires while they were outside Britain, then the right to remain without renewal is limited to seven days.

Another aspect of the British law on entry is that no sanctions are imposed upon carriers who have transported non-nationals with inadequate documentation from Ireland.

Irish law provisions

Irish immigration law also makes special provisions for entry from Britain, but is less detailed, and avoids referring to the common travel area in specific terms. Its approach is to place different obligations on aliens according to whether they have entered from Britain or elsewhere. Under the Aliens Order 1946, an alien who wishes to enter Ireland from a state other than Britain must land at a designated port, and must obtain leave to land, which may be refused on various grounds. By contrast, aliens who enter Ireland from Britain do not ordinarily require leave to enter. They are instead obliged:

- to have a visa, if they are visa nationals;
- to report to a 'registration officer' within seven days;
- to obtain leave to remain within one month of taking up business or employment, or three months in other cases.

The law on entry in Ireland was the subject of a significant amendment in 1997, as a result of which immigration officers may now examine aliens entering from Britain, and apply the same conditions to them as if they had arrived from elsewhere.

In addition to special provision for entry to Britain from Ireland, and vice versa, the common travel area implies that Britain and Ireland may be called upon to enforce the other's immigration policy.

Visa policy

The common travel area has also led Irish visa policy being strongly influenced by Britain.[13] Comparative tables developed by Ryan show a consistent pattern between 1985 and 1998 that once Britain imposed a visa requirement upon the nationals of a given state, Ireland quickly followed.[14] The same does not hold true the other way round; in the cases where Ireland first imposed a visa requirement, evidence of Britain's willingness to follow suit is hard to find. The clear implication is that in the area of visa policy, Ireland has been upholding British requirements, rather than vice versa.

Irish law and practice have also upheld British immigration decisions in relation to individuals. A key provision in this regard authorizes the exclusion from Ireland of non-nationals who are undesirable in Britain. In addition to refusing entry to certain persons thought likely to travel to Britain, the Irish authorities have also been willing to deny residence to those subject to a deportation order in Britain.

The discussion so far has shown the durability of the "arrangements … relating to the movement of persons" between Britain and Ireland. These arrangements have influenced the status of Irish nationals in Britain and British nationals in Ireland and as a consequence there have been no systematic immigration controls on travel between Britain and Ireland. They have also led the two states – and Ireland in particular – to be prepared to enforce each other's immigration requirements.

1.4. Interim conclusions

This brief comparative analysis of the examples of regional free travel areas shows that different country groups chose different approaches to deal with the fundamental problem of any free travel area: how to reconcile internal free movement with the sovereign right of each country to determine which persons can enter its territory.

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[13] The British 'negative list' of states whose nationals require a visa is set out in HC 395 (1993-94), Statement of Immigration Rules for Control on Entry, HC 509 (1971-72), para 8. Appendix I (as amended).

The Irish 'positive list' of states whose nationals do not need a visa is set out in Aliens (Visas) Order 2001 (SI No 36 of 2001).

[14] See RYAN, op.cit., p. 866-867.

The Nordic Union was composed of a small group of very homogeneous countries which had a high level of trust among each other and could thus function without elaborate common rules for the external border. The Nordic Union could not serve as a model for the EC because this level of trust did not exist among the member countries of the EC.

The bilateral free travel area between the UK and Ireland could not serve as a model either because it constituted a practical arrangement between two countries that could not have worked on a multilateral basis among a much larger number of countries. However, it is symptomatic that these two countries that preferred to keep their bilateral arrangement even when most countries on the continent decided to pursue the avenue of multilateral cooperation, albeit first outside the EC legal framework.

The Benelux Passport Union became in the end the model for the Schengen area. However, the road to the Schengen area was not direct. It involved several aborted attempts.

2. Pre-Schengen intergovernmental cooperation on visas[15]

2.1. Precursor ideas: Passport Union

As was demonstrated earlier, in the EEC Treaty, it was already established that EC nationals have an individual right of entry into other Member States without the need of a visa and without the need of a stamp in their passports.[16]

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[15] For a detailed review of the pre-Maastricht cooperation see D. PAPADEMETRIOU, *Coming together or pulling apart? The European Union's Struggle with Immigration and Asylum*, Carnegie Endowment for International Peace, (Washington D.C., 1996), pp. 19-50; S. PEERS, *EU Justice and Home Affairs Law*, Longman (London, 2000), pp. 15-16; A. GEDDES, *Immigration and European Integration: Towards Fortress Europe?*, Manchester University Press, (Manchester, 2000), pp. 67-68, DEN BOER AND WALLACE. "Justice and Home Affairs", in Wallace and Wallace (eds), *Policy-Making in the European Union*, 4th edition, Oxford University Press, (Oxford, 2000), pp. 494-495, A. CRUZ, "An Insight into Schengen, Trevi and other European Intergovernmental Bodies", CCME Briefing Papers No 1 (Second edition), Brussels, (1992).

[16] Of course, within the existing systems of visa free travel, both bilateral (United Kingdom and Ireland) or multilateral (the Benelux countries) the right of free movement was even wider. Case C-157/79 *Pieck* [1980] ECR 2171 illustrates this. The case involved a Dutch national, resident in Cardiff, Wales, pursuing an activity as an employed person, against whom criminal proceedings were brought. The charges were that, being a person who was not a "patrial" (British national having a right of abode in the United Kingdom) and having only been granted leave to enter the United Kingdom or to remain

Third country nationals did not benefit from such treatment and in all cases the national visa rules of each country still applied to them. The only group of third country nationals to which common rules applied was the family members of EC nationals who exercised their right of free movement. For such third country nationals, Member States were obliged to grant and facilitate the issuing of visas.[17]

The first initiative that included short term visas in its scope at the European level was the Commission Consultative Document on Passport Union, presented in 1975.[18] In

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there for a limited period, knowingly remained beyond the time limited by the leave. The accused held no residence permit; when he last entered the territory of the United Kingdom, on 29 July 1978, an endorsement containing the words "*given leave to enter the United Kingdom for six months*" was stamped on his passport. In the course of the procedure before the Court, the British Government maintained that the phrase "entry visa" means exclusively a documentary clearance issued before the traveller arrives at the frontier in the form of endorsement on his passport or of a separate document, on the contrary an endorsement stamped on a passport at the time of arrival giving leave to enter the territory may not be regarded as an entry visa or equivalent document (paragraph 6). The Court did not uphold this argument and stated that "*for the purpose of applying the Directive, the object of which is to abolish restrictions on movement and residence for Community workers within the Community, the time at which clearance to enter the territory of a Member State has been given and indicated on a passport or by another document is immaterial*". Furthermore, the right of community workers to enter the territory of a Member State which Community law confers may not be made subject to the issue of a clearance to that effect by the authorities of that Member State (paragraph 8). The Court also held that Article 3 (2) of Council Directive No 68/360 prohibiting states from demanding an entry visa or equivalent requirement for Community workers moving within the Community must be interpreted as meaning that the phrase "entry visa or equivalent requirement" covers any formality for the purpose of granting leave to enter the territory of a Member State, which is coupled with a passport or identity check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted (paragraph 10).

[17] For a recent case confirming this, see Case C-157/03 *Commission v. Spain* [2005] ECR I-2911. The proceedings for failure to fulfil obligations originated from two complaints submitted to the Commission by Community nationals exercising the right of freedom of movement conferred on them by the EC Treaty, whose spouses were refused a residence permit in Spain; the reason given was that they should first have applied for a residence visa at the Spanish consulate in their last country of domicile. The facts giving rise to those complaints took place in 1998 and 1999. The Court held that "in accordance with Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148, when a national of a Member State moves within the Community with a view to exercising the rights conferred on him by the Treaty and those directives, the Member States may demand an entry visa or an equivalent document from members of his family who are not nationals of one of those States." (paragraph 32) (also MPAX, paragraph 56). However, those States must grant family members who are not nationals of one of the Member States every facility to obtain the necessary visas. In that regard, the Court has held that if the provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory (MRAX, paragraph 60) (paragraph 33). Right of entry of family members derives from the family relationship alone. See also Case C-459/99 *MRAX* [2002] ECR I-6591 (paragraphs 56 and 60).

[18] "Towards European citizenship: implementation of point 10 of the final communiqué issued at the European Summit held in Paris on 9 and 10 December 1974 concerning a Passport Union", Report presented by the Commission to the Council, COM (75) 322 final, Brussels, 2 July 1975; Detailed analysis of the initiative and history of its development can be found in A. MELONI, *Visa Policy within the European Union Structure*, Springer (Berlin, 2006); and House of Lords Select Committee on the European Communities (1979), Passport Union, 10th Report, 24 July 1979.

its report the Commission set two short-term objectives for the establishment of a Passport Union. The first was the creation of a uniform European passport to be issued by each Member State to its nationals, in place of the existing passport of varying appearance; the second was the abolition of checks at the internal frontiers of the Community on the nationals of both Member States and non-Member States. The Commission also considered that a Passport Union would involve two long-term objectives: securing equality of treatment outside the Community for those holding a uniform passport and, harmonizing the treatment of aliens within the Community.

The adoption of measures related to visas constituted a corollary of the second short term objective which the Commission set, the abolition of checks at the internal frontiers of the Community. The latter, according to the Commission, was to include not only the abolition of passport checks, but also border checks on the ancillary documents such as visas and residence and work permits.

However, as the focus of the proposal had been concentrated on the development of common passports, there was virtually no debate at this stage on the proposal for the abolition of checks at internal frontiers. This first mention of a visa on the European level demonstrates several ideas that can be found at the later and more elaborate stages of development.

Firstly, common visas are considered, by the authors of the proposal, as a necessary measure to be adopted after the possible abolition of internal border controls. In order to have full freedom of travel, valid for both EC nationals and third country nationals, there should be a common system in place guaranteeing that the persons accepted in the common territory are indeed acceptable to all countries involved. The Commission proposal draws on some experiences from the already existing areas with relaxed formalities for internal travel, such as the Benelux countries, the UK and Ireland and the Nordic Union. These existing schemes depend on some degree of harmonization of national policies and law on matters such as immigration, deportation, and the granting of visas, or on common administrative arrangements.[19]

[19] House of Lords Select Committee on the European Communities (1979), Passport Union, 10th Report, 24 July 1979.

2.2. The preparatory work of inter-governmental groups

Before the Single European Act, no concrete steps were taken regarding cooperation on visa issues among the Member States. However, the goal of accomplishing an area without internal frontiers was in the Treaty and concrete action was needed if it was to be achieved. The discussions as to exactly what measures were necessary to achieve that goal were at the core of the disputes of that time (1970s and early 1980s). Cooperation on visas was not considered part of the problem, but rather a compensatory measure necessary to 'flank' the lifting of the internal border controls.[20]

The breakthrough came with the Single European Act and its goal of the development of an "area without internal frontiers," however; disagreement remained on the type of measures necessary for the achievement of this goal. According to the Commission, such a goal inevitably meant the abolition of internal border controls and the adoption of flanking measures resulting from such an abolition (including on visas). Most Member States agreed, however, the United Kingdom and Denmark argued that the free movement of persons could be achieved even without the abolition of controls. Their interpretation was that the free movement of persons was guaranteed to EC nationals only for economic purposes. Thus internal border controls were still necessary in order to distinguish between EC and third country nationals. The Single European Act (SEA) became possible when the parties in effect agreed to disagree. The UK and Denmark signed up to the SEA but the continental European Member States who persisted with their point of view took a different route towards free movement.

Two Declarations were made in the Single European Act; one was general regarding Articles 13-19 and one was on the free movement of persons. The General Declaration on Articles 13 to 19 states:

> Nothing in these provisions shall affect the right of Member States to take measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.

[20] A detailed historical account can be found in A. MELONI, *Visa Policy within the European Union Structure*, Springer (Berlin, 2006) and R. FUNGUEIRIÑO-LORENZO, Visa-, *Asyl- und Einwanderungspolitik vor und nach dem Amsterdamer Vertrag : Entwicklung der gemeinschaftlichen Kompetenzen in Visa-, Asyl- und Einwanderungspolitik*, Peter Lang, (Frankfurt, 2002).

While the Political declaration by the Governments of the Member States on the free movement of persons stated:

> In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.[21]

As there was no agreement at the time on a Community competence in flanking measures, Member States started intergovernmental cooperation in this field. The base was the already existing structure of the Trevi group on criminal matters (created in 1976), whose mandate was broadened in view of the 1992 project.[22]

Thus at this stage the informal cooperation continued among all EC Member States through the intergovernmental working groups in the framework of the extended Trevi system. Meanwhile, however, another initiative appeared that started as a simple bilateral arrangement, the Saarbrücken Agreement between France and Germany. It proved so successful that it constituted the basis of the development of a new larger passport-free area in Europe, namely the Schengen area. The Schengen Agreement was thus signed in 1985, followed by its implementing Convention in 1990, both still outside the EC structures as they existed then. The objective of the Schengen group of countries was clearly the abolition of the controls on their internal borders and the accomplishment of all necessary compensatory measures. The Schengen cooperation, whose principles and even some legal acts still form the basis of the present visa regulation in the EU, will be studied in detail below. The development of the Schengen area would not have been possible without the preparatory work of two further intergovernmental groups, whose work will now be briefly summarized.

[21] Single European Act O.J. 1987, L 169 of 29 June, pp. 25-26.

[22] MELONI, op. cit., p. 48.

2.2.1. Ad hoc group on Immigration

Coming back to the intergovernmental cooperation and coordination that preceded Schengen, the first notable group of high level immigration officials from the Member States was created as a result of the meeting of the Ministers of Justice and Home Affairs in London in October 1986, called the Ad Hoc group on Immigration. The main objective of this group was to develop cooperation on immigration policy. The group included several working groups on issues that were periodically updated when necessary. The initial working groups were on asylum, external frontiers, false documents, admission, deportation and information exchange, for example. A working group on visas was set up at a later stage. Its terms of reference in the visa field included the harmonization of the Member States' visa policies and the effect of such action on improving external controls. However, judging by the activities undertaken by the group, harmonization was understood as the development of a common visa list for countries whose nationals required visas to enter into the territory of all Member States; in essence, the core of any visa policy.

The first attempt (at the intergovernmental level) to evaluate the feasibility of harmonizing Member States' visa policies (and the effect of such action on improving external controls) was thus made by this Ad Hoc Group on Immigration.[23] The first visa list prepared by the group was adopted in 1987 and included a list of 50 countries whose nationals were required to have a visa to enter the territory of any of the Member States. By 1993, the number of countries on the black visa list grew to 73, a white visa list appeared and included 19 states, while a still significant number of 92 states, on which agreement could not be reached, fell into the grey list and thus required visas for only some of the EC Member States.[24] However, due to the intergovernmental character of the cooperation, the lists agreed, in effect, did not go any further than what already existed within the framework of other common travel areas. The work done amounted to a simple cumulation of the visa lists of individual Member States and the inclusion of states on whose position there was already an

[23]The Group's mandate was wider than visa policy and included other immigration issues, such as asylum, external frontiers, false documents, admissions, deportations and information exchange. For more details see D. PAPADEMETRIOU, *Coming together or pulling apart? The European Union's Struggle with Immigration and Asylum*, Carnegie Endowment for International Peace, (Washington D.C., 1996), p. 28.

[24] For a detailed historical review, see MELONI, op. cit., p. 50.

existing policy with a similar effect. No great effort was put into actively negotiating the position of states which, after the cumulating exercise, happened to be on the grey list.

Thus the activities of the Group support the view of some authors that "the Group's mandate was defined as the coordination of Member States' visa regulations (at the risk of duplicating similar work being done in the EPC at the behest of Foreign Ministers)".[25] Another interesting aspect of the work of the Ad Hoc Group is the interplay that becomes evident at the European level between the areas typically covered previously by the Ministries of Interior and those covered by the Ministries of Foreign Affairs. As already argued in Chapter 1 of this study, until the 1980s visa policy as a foreign policy tool was a typical prerogative of the Ministries of Foreign Affairs. Thus if a coordination of the policies of the Member States was necessary in this field, it was to be carried by the Ministries of Foreign Affairs. The work of the Ad Hoc Group on Immigration is one more example of how this situation changed so that visa policy and especially the coordination of the visa lists became an acceptable field of activity of the Ministers of the Interior.

Despite its tasks being the 'harmonization' of visa policy, what the Group achieved was rather alignment among the various national visa policies. However, the work of the Ad Hoc Group on Immigration marked progress in comparison to the three sub-regional travel areas (Benelux, the Nordic Union and the UK and Ireland) in at least attempting the creation of common lists, even if they did not differ greatly from the individual national ones. As we have already seen, the predominant previous practice in operating areas without internal frontiers was alignment in combination with mutual trust and mutual recognition of the visas issued by other parties.

2.2.2. Group of Coordinators on the Free Movement of Persons

The Ad Hoc Group and the Trevi group were not the only intergovernmental groups active in fields with a bearing on the free movement of persons. As the number of various intergovernmental groups in the field grew, a need arose to coordinate their

[25] S. NUTTAL, *European Political Co-operation,* Clarendon Press, (Oxford, 1992), p. 301.

activities. For that purpose, the European Council in Rhodes in 1988, created the Group of Coordinators on Free Movement of Persons. The Group was composed of senior officials from the EC Member States and was supposed to coordinate the activities of numerous groups with quite diverse agendas: the Ad Hoc Immigration Group; the Trevi Group; the Mutual Assistance Group; the Judicial Cooperation Group on European Political Cooperation; and the Horizontal Group on Data Processing. The European Commission also took part in the work of the Group of Coordinators. The objective of the Group was defined as "coordinating, giving impetus to, and unblocking the whole complex of intergovernmental and Community work in the field of the free movement of persons".[26]

The Group prepared the Free Movement of Persons Report which was adopted by the European Council in Madrid in June 1989 and became known as the Palma Document.[27]

Having as its starting point the Community initiative for the elimination of internal frontier checks, the Palma Document advocated reinforced checks at the Community's external frontiers and then the abolition of internal borders controls.[28] As was demonstrated earlier, this is only one of the possible approaches to achieving an area with a sufficient level of free movement. In the case of the Nordic Passport Union, the exact opposite happened in fact; first the movement of persons was liberalized and only then the drive to strengthen external frontiers did take shape.

The Palma Document reads more like a working plan than a policy document. In each of the two areas of cooperation: strengthening external border controls and abolishing the internal one, a list of measures was developed. The measures themselves were classified in two groups depending on their perceived importance. Those with high

[26] PAPADEMETRIOU, op. cit., p.37.

[27] The report was approved by the Group of Coordinators in Palma de Mallorca and thus became known as the Palma Document instead of its official name. The text of the document is included as an Annex to the House of Lords Select Committee on the European Communities, Session 1988-1989, 22nd Report, *1992: Border Control of People.*

[28] For more details on the Palma Document, see PAPADEMETRIOU, op. cit., p. 37.

priority were listed as "essential" and had fixed deadlines, while those considered as "desirable" could be implemented whenever possible.[29]

The part of the Palma document dealing with visa policy classified as "essential" the following elements of visa policy: [30]

1. the list of countries whose nationals are required by all Member States to have visas to cross their external borders (black list), to be updated every six months;
2. harmonized criteria and conditions for issuing visas and the strengthening of diplomatic and consular cooperation;
3. a common list of undesirable persons and a convention establishing a procedure for prior notification in the event of a visa being issued by a Member State to a person on such a list.

The elements that were only "desirable" were:

1. a common visa application form to be created by 1989;
2. a common "European visa" to be introduced by 1992; and
3. the computerization of the exchange of information needed in visa processing, to be completed by 1991.

2.3. Interim conclusions

The Schengen Agreement was preceded by a long discussion on to what extent the internal market implied the abolition of internal control on persons. This disagreement was never settled. In the end the two sides agreed to disagree, and a group of continental Member States proceeded outside the EC legal framework. However, their success would not have been possible without the work of a number of intergovernmental groups, which in previous years had discussed and clarified a

[29] Ibid., p. 37.

[30] The other essential elements cited in the report were: harmonization of criteria and procedures for granting visas, accompanied by diplomatic and consular cooperation and a common list of inadmissible persons and elaboration of a convention for this purpose and procedure for prior notification in the event of a visa being issued by a Member State to a person on such a list. The "desirable" components were (1) common visa application form to be created by 1989; (2) a common "European visa", to be introduced by 1992; and (3) the computerization of the exchange of information needed in visa processing, to be completed by 1991. Palma Document, Annex I, Part V, A and B.

number of practical and legal issues that were to be fundamental to the functioning of the Schengen agreement.

3. Schengen[31]

3.1. From Schengen Agreement to Schengen Convention

It is useful to briefly consider the political context of the time as it influenced both the choice of legal measures and the legal developments that occurred subsequently.

ANDERSON[32] puts forward the idea that the creation of Schengen was the result of several political factors. The economic difficulties in France in the mid-1980s resulted in a change of priorities and the search for a valuable and symbolic European project to confirm the status of France as a leading power in the EC. Such a project was found in the area of frontier controls, an issue which proved to be of high symbolic value. This French initiative was met with a positive response by Germany and Benelux, which for their part wanted to resume the integration process and inevitably considered the European Community a vehicle for gaining higher international standing. Moreover, there were strong economic motives for the opening of frontiers and public opinion was generally favourable towards such a development.

The Fontainebleau summit in June 1984[33] initiated a programme called "Europe for Citizens" including the suppression of all frontier controls between Member States, laying the foundations of the future Single European Act. Despite this move at the European level, France and Germany proceeded with their bilateral agreement, the

[31] For analysis of the Schengen cooperation see MEIJERS ET AL., *Schengen: Internationalisation of central chapters of the law on aliens, refugees, privacy, security and the police*, Kluwer law and taxation, (Deventer, 1991); M. DEN BOER (ed.), *The Implementation of Schengen: First the Widening, Now the Deepening*, European Institute of Public Administration, (Maastricht, 1997); A. PAULY (ed.), *De Schengen à Maastricht: voie royale et course d'obstacles*, European Institute of Public Administration, (Maastricht, 1996); R. DEDECKER, "L'asile et la libre circulation des personnes dans l'accord de Schengen", Courrier hebdomadaire n° 1393-1394, (1993), Centre de recherche et d'information socio-politiques; J.-S. LOUETTE, "Les Etats du Benelux et la France face aux accords de Schengen", Courrier hebdomadaire n° 1586-1587 (1998), Centre de recherche et d'information socio-politiques.

[32] M. ANDERSON, "Genèse de Schengen, approche historique des objectifs initiaux et des résultats atteints", paper presented at the seminar "Schengen revisité: 20 années d'expérience", 9-11 March 2005, organized by the Luxembourg Presidency of the EU.

[33] Fontainebleau European Council, "Presidency Conclusions", 25 and 26 June 1984.

Saarbrücken Agreement of 30 July 1984, for the gradual removal of controls at their common border.[34] The Benelux countries expressed their interest in also joining the initiative, given that there was already a functioning travel area among them. The participation of the Benelux countries thus brought in the know-how of their experience with their trilateral free travel area.

3.1.1. The Schengen Agreement of 1985

As a result, the 1985 Agreement signed in Schengen among France, Germany and the Benelux countries closely followed the provisions of the Benelux agreement on frontier controls, extradition and mutual assistance in criminal matters. In form, the Schengen Agreement followed the Saarbrücken Agreement. It was a relatively short document of 33 articles and envisaged measures in two groups: measures applicable in the short-term (Title I) and measures applicable in the long term (Title II). The Schengen Agreement states the long-term aspiration to abolish all frontier controls and listed the areas in which agreement would be necessary. Article 17 states the general objective of "abolishing checks at common borders and transferring them to their external borders" and foresees two lines of action necessary to achieve this goal:

1. Harmonization, where necessary the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based;
2. Compensatory measures to safeguard internal security and prevent illegal immigration by nationals of states that are not members of the European Community.

Rules on visa were present in both the short-term and the long-term measures. In the short-term, the agreement foresaw the approximation of the visa policies of the parties, in order to "avoid the adverse consequences in the field of immigration and security that may result from easing checks at the common border". As a long-term objective, the harmonization of parties' visa policies and the conditions for entry to

[34] According to some authors the agreement was provoked by a series of protest by truck drivers about delays and congestion at the German-French border crossing points, resulting from controls there. See PAPADEMETRIOU, op.cit., p.26, DEN BOER AND WALLACE, 'Justice and Home Affairs', in WALLACE AND WALLACE(eds.), *Policy-making in the European Union,* (Oxford, 2000), p.498.

their territories is mentioned. Moreover, it also foresaw the possibility of the harmonization of certain aspects of the law on aliens with regard to nationals of states that are not members of the European Community.

However, the purpose of the Schengen Agreement had been to give a political signal and it stated only the objectives to be reached. The precise measures by which to reach them were not specified; a fact that made the Schengen Implementing Convention necessary.

There was a debate about the actual legal content and significance of the Schengen Agreement, especially considering the provision of Article 32, which states that the agreement shall be signed without being subject to ratification.[35] While some authors, such as MELONI, considered that the Member States treated the agreement as a declaration of intent, others (ANDERSON) considered that the inclusion of the Agreement in the list of the Schengen *acquis* integrated into the Community Law[36] by the Treaty of Amsterdam is sufficient proof of its legal significance. The second argument seems more convincing.

There are different views on the precise reasons for proceeding outside of the Community structures. MELONI believes that the decisive factor was the inability to reach agreement among all Member States on the removal of internal frontier controls. Thus, those Member States that shared such an objective, established cooperation between themselves; a cooperation that paralleled the cooperation on justice and home affairs among all the Member States.[37] Others, like ANDERSON[38] add to the difficulties arising from the opposition of the UK and the unwillingness of the European Commission at the time to discuss the issue of frontier controls separately from the 1992 project; the distrust felt then towards the Mediterranean countries[39] and the difficulty with which international law conventions were negotiated when all

[35] Only the Netherlands ratified the agreement nonetheless.

[36] Decision 1999/435, O.J. 1999, L 176/1.

[37] MELONI, op. cit.

[38] ANDERSON, op. cit., p.6.

[39] According to Anderson, op. cit., Schengen Technical Inspections, to later become the Schengen Evaluation Team (SCHEVAL) were developed following Italy's application to join Schengen as a way for the partners to check the preparedness of a candidate to meet the requirements of the system.

Member States were signatories. One example of these compounded difficulties were the negotiations for the draft Convention on the External Frontiers, which started soon after the Fontainebleau summit in 1984, but the Convention was never signed.[40] These two views are not mutually exclusive. There were indeed Member States which did not give up their sovereignty in this delicate field. Moreover, the level of mutual trust necessary for an agreement to lift internal border controls existed only among a core group of Member States.

The various steps necessary to achieve the final objective, as declared in the Schengen Agreement, were set out in a Convention implementing the Agreement (hereafter the Schengen Convention) of 1990. It was an elaborate document of 142 articles which spelled out the "compensatory" measures at the core of the Schengen space. The need for these measures was based on the understanding that if frontier controls between Member States were to be abolished, internal security could only be guaranteed by greater police and judicial cooperation between these states. The main difficulty arose over the fact that such cooperation touched on matters that had previously been solely within the sovereign jurisdiction of states.

The five original signatories conducted the negotiations in secret for five years. This slow progress was due to several sensitive points (like the right of hot pursuit across the border (even if limited), cross-border police surveillance, and the common visa policy and visa lists). The problem with visas was that a common visa policy inevitably meant having a common regime towards third countries, which would have an impact on important historic, cultural and commercial ties, as well as sensitive foreign policy and security issues. The progress of the negotiations was slow until the Dutch negotiator, Juliaan Schutte, produced an integrated draft at the 1988 Paris meeting of the central negotiating group.[41]

[40] The Convention was negotiated for almost ten years and its conclusion failed due to a dispute between the UK and Spain on the issue of Gibraltar. Later, the Commission proposed a similar text, as an annex to a third pillar Council Decision but for similar reasons the Convention was never signed.

[41] Mentioned by ANDERSON, op.cit., p. 7

Ultimately, the Schengen Convention was signed by the five states signatory to the original Schengen Agreement on 19 June 1990.[42]

3.2. The Schengen Convention at a glance

3.2.1. Overview

The Convention provided for the methods to be used in achieving the objective proclaimed by the Schengen Agreement and in doing so went into more detail regarding the compensatory measures, also referred to in the agreement but meant to compensate (as the name suggests) the security deficit likely to appear after the abolition of internal borders.
The compensatory measures followed two lines, one – towards the strengthening of external borders and the other – towards the strengthening of police and judicial cooperation between national authorities.

The final text of the Convention was structured along the lines of the working groups that had conducted the negotiations. These included: police and security (including sub-groups on illegal drugs and psychotropic substances, firearms, illegal immigration and exchange of data), movement of people, transport and movement of goods; there was no separate treatment of visas.

Consequently, the Convention was also structured in this way. The part dealing with the abolition of checks at internal borders and the movement of persons included the entry conditions that aliens had to fulfil to enter the Schengen territory;[43] conditions for the movement of aliens on the Schengen territory; provisions on the harmonization of visa policy and accompanying measures aimed at punishing illegal entry.[44] It also

[42] Convention Implementing the Schengen Agreement, published in O.J. 2000, L 239. For in depth analysis see O'KEEFFE, "The Schengen Convention: A Suitable Model for European Integration?" *Yearbook of European Law 1991*, 11, pp. 185-219. ; SCHUTTE, "Schengen: Its Meaning for the Free Movement of Persons in Europe", 28 CML Review 549, (1991).

[43] Articles 5 and 19-20 Schengen Convention. Text published in the OJ L 239, 22.9.2000

[44] Articles 9-17 and 26-27 Schengen Convention.

included rules on the responsibility for assessing asylum applications, which were later replaced by the rules of the Dublin convention.[45]

The part dedicated to police and security[46] of the Schengen Convention contained rules on:

(1) police cooperation for the purpose of preventing and detecting criminal offences, cross-border observation and hot pursuit;[47]
(2) mutual assistance in criminal matters, the application of the principle *ne bis in idem*, extradition and the transfer of the execution of criminal judgments;[48]
(3) the prevention and punishment of illegal trafficking in drugs;[49] and
(4) the acquisition, possession and trading in firearms and ammunition.[50]

A specific part in the Convention was dedicated to the Schengen Information System (SIS) – a joint database containing information on persons and objects used for the purpose of maintaining public order and security.[51] The system itself recalls the practice of the earlier regional free movement areas (Benelux, the Nordic Union), where one of the key elements was also an agreement regarding those individuals (here it is also extended to objects) who are considered unacceptable by all parties. The obvious concerns related to data protection were answered by both a special chapter (Chapter 3) in the Title IV dealing with the SIS, but also with a special Title VI, dedicated exclusively to the protection of personal data.

A key factor in its future success was that the implementation of the Schengen Convention was entrusted to a specially formed body, called the Executive

[45] Articles 3-4, 7-8 and 28-38 Schengen Convention

[46] Title III of the Schengen Convention.

[47] Articles 39-47, Schengen Convention.

[48] Articles 48-69, Schengen Convention.

[49] Articles 70-76, Schengen Convention.

[50] Articles 77-91, Schengen Convention.

[51] Articles 95-100 Schengen Convention, made provision for the kind of data which could be stored in the SIS. These include data related to persons wanted for arrest for extradition purposes, aliens to be refused entry, witness or parties in a judicial proceeding and persons to be kept under discreet surveillance for the purpose of prosecuting criminal offences or preventing threats to public safety. Article 101 identifies which national authorities were entitled to access the SIS, and Articles 102-118 provided for a privacy protection regime.

Committee, which included a minister from each country responsible for the implementation of the Convention at national level and acting unanimously.[52] In order to support the work of the Executive Committee a system of working parties composed of national experts was also set up in order to prepare the work of the Executive Committee. The European Commission was present in an observer capacity at all levels of preparation and deliberation of decisions. In essence, the core of the Schengen *acquis* when it was later integrated into the European legal order consisted of more than 200 decisions of the Executive Committee, a significant part of which was never published due to their "confidential" character.[53]

3.2.2. First reactions

The system created by the Schengen Convention raised a number of legal and political issues. The main points of criticism included the secrecy involved in the implementation of the Schengen rules, which lacked parliamentary control[54]. Judicial control was also missing, both at European and national levels. There was therefore no possibility to challenge decisions for refusal to issue visas or refusal to allow entry.[55] A similar problem arose in the case of the SIS, concerning the possible grounds for including an individual in the SIS; an action that was also not accompanied by adequate (judicial) remedies in cases of wrongful decision.[56]

An additional point of criticism concerned the carrier sanctions introduced by the Schengen Convention, mainly because of the fear that they could interfere with the

[52] Articles 131-133 Schengen Convention.

[53] In a Joint Declaration to the Schengen Convention, the contracting parties undertook an obligation to inform their national parliaments for the implementation of the Convention. However, only the Dutch government did so when it asked its parliament for ratification.

[54] See among others, Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Paper regarding the Rules of Procedure of the executive Committee of Schengen, CM93-207, Utrecht, 25.8.93, 12 p.,

[55] This situation changed with the integration of the Schengen acquis into the framework of the European Union with the Amsterdam Treaty. See, Case C-503/03 *Commission v. Spain* [2006] ECR I-1097 concerning SIS and the EC free movement of persons and their family members, discussed below.

[56] See O'KEEFFE (1991), op. cit., pp. 188 and 212. For detailed country reports on judicial protection in relation to Schengen see FIDE 2004 Report, cited in Chapter 1.

possibility of asylum seekers to escape from countries where they feared persecution.[57]

3.2.3. Schengen in action

The Schengen Convention entered into force on 25 March 1995 for its founding countries – Germany, France and the Benelux countries and also for Spain and Portugal, which had meanwhile acceded to the Convention. The implementation of the Convention was delayed mainly due to the lack of trust on some important policy issues between some of the participating states, such as for example the Dutch drugs policy.[58] In later cases, the delay in the full participation in Schengen was due to national particularities, such as the type of borders that needed to be secured. Such was the case of Greece, whose participation in Schengen was operational only ten years after the signature of its accession treaty to Schengen in 1992, mainly due to problems with securing its maritime border.[59] The full participation of Italy was also delayed, although the accession treaty to Schengen was signed in 1990, due to French concerns over Italy's ability to properly carry out frontier controls and practical and legislative problems.[60]

By 1995-1996 ten of the twelve European Community member states were party to the Convention. When Finland and Sweden joined the EU in 1995 they expressed an interest in taking part in Schengen. But this implied the need to find a way to accommodate inclusion into the system of states that were not EC members, if the existing Nordic Union were to be preserved. This implied that together with the three Scandinavian states, Iceland and Norway also had to join Schengen. The mechanism of doing so together with its legal implications will be studied in the next chapter.

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[57] Carriers' sanctions were also arguably in breach of Annex 9 to the International Convention on Civil Aviation. Carriers' sanctions imposed by the United Kingdom were later found in breach of Article 6 and Article 1 of Protocol 1 ECHR by the Court of Appeal in Roth v. Home Secretary [2002] EWCA Civ 158

[58] DEN BOER AND WALLACE, op. cit., p. 498; PAPADEMETRIOU, op. cit.; p. 27.

[59] DEN BOER AND WALLACE, op. cit., p. 498.

[60] The main concerns were linked to absence of national laws on protection of personal data, difficulties in establishing the Italian national section of the SIS, and difficulties in adapting Italian airport structures. According to NASCIMBENE (1997), referred in MELONI, before its entry into Schengen, Italy did not have any comprehensive legislation on asylum and immigration.

3.2.4. Relationship with EU law

The Preamble to the Convention stated that the aim of the Contracting parties was to achieve the objective of establishing an internal market, as provided in the EC Treaty, without prejudice to the measures to be taken to implement the provisions of the EC Treaty. O'KEEFFE's interpretation of this text is that the Convention will apply only insofar as it was compatible with Community law, and that once the Member States concluded conventions "with a view to completion of an area without internal frontiers" its relevant provisions were to be amended or replaced accordingly.[61]

However, even before the Schengen Convention was ratified, its content was being hollowed out by regulation at EC level. The few clauses dealing with the free movement of goods were made redundant by the 1992 programme. The part dealing with the free movement of persons, including control on persons at the internal border was being limited by Community legislation. The 1990 directives on students, retired persons and economically inactive persons effectively ended the possibility of checking those persons at the internal borders[62]. Moreover, a 1991 ECJ Judgment declared illegal the question put to a community national at the German Dutch border about the reason for his journey.[63] Thus, what remained as a core of regulation for the Schengen convention were the issues linked to checks at external borders, refugees and third country nationals, including visa policy and police and judicial cooperation.

[61] For an in-depth analysis see O'KEEFFE (1991), op. cit., pp. 209-211.

[62] Council Directive on the right of residence for students, 93/96/EEC of 29 October 1993, Council Directive on the right of residence for employees and self-employed persons who have ceased their occupation activity, 90/365/EEC of 28 June 1990, Council Directive on the right of residence, 90/364/EEC, of 28 June 1990.

[63] Case C-68/89 *Commission v. Netherlands* [1991] ECR I-2637. The Commission brought this action against The Netherlands for failure to fulfil obligations, by maintaining in force and by applying legislation by virtue of which citizens of a Member State may be required to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal before being permitted to enter Dutch territory. The Court held that " *nationals of the Member States of the Community generally have the right to enter the territory of the other Member States in the exercise of the various freedoms recognized by the Treaty and in particular the freedom to provide services which, according to now settled case-law, is enjoyed both by providers and by recipients of services*" (paragraph 10). The Court continues that, the only precondition which Member States may impose on the right of entry into their territory of the persons covered by the abovementioned directives is the production of a valid identity document or passport (paragraph 11). More generally, the obligation to answer questions put by frontier officials cannot be a precondition for the entry of a national of one Member State into the territory of another (paragraph 13).

3.3. Interpretations of the Schengen rules on visas

In the logic of the Schengen Convention, visa policy forms part of the compensatory measures aimed at increasing security once the internal border controls are lifted. As such, the visa rules were part of the measures for the harmonization and strengthening of the external border controls.

Several interpretations have been put forward to date in an attempt to extract the essence of the visa rules in Schengen.

For example, according to GUILD,[64] the Schengen system is based on three main principles with regards to the free movement of persons:

> 1. Exclusion of security risks. This implies that no third-country national should gain access to the territory of the Schengen states (with or without a short-stay visa) if he or she might constitute a 'security risk' for any one of those states;
> 2. 'Mutual recognition'. This principle implies that in general entry across one Schengen external border constitutes admission to the whole territory and an assumption (not as high as presumption in law) that a short-stay visa issued by any participating state will be recognized for entry to the common territory for the purpose of admission (there are explicit exceptions justifying refusal specifically on security grounds); and
> 3. Free movement inside Schengen. This principle implies that once within the common territory, the person is entitled (subject again to security exceptions) to move within the whole of the territory for three months out of every six without further control at the internal borders of the participating states.

The main focus of the system is to ensure that persons who are or might be considered unwanted by any participating state are not permitted into the territory. Thus the rules focus on who must be excluded and provide little guidance on who should be admitted. Because the underlying principle of the system is mutual recognition of national decisions rather than harmonization, the search for legal mechanisms to

[64] The principles were identified in this form by E. GUILD, *Moving the Borders of Europe*, Inaugural lecture, University of Nijmegen, (Nijmegen, 2001), p. 16.

achieve this has unexpected implications. The lifting of border controls between the states means that positive decisions on the admission of persons are likely to be respected by default – the parties have fewer identity checks when crossing the borders.

The principles of the Schengen system are achieved through the deployment of four tools:

1. The **Schengen Information System (SIS),** which allows the competent authorities of the mentioned states to acquire information regarding persons and property. The implication of having one's name on the SIS list could range from simply having one's documents scrutinized every time one enters the Schengen zone to a blank refusal of a visa. Not all Schengen countries feel obliged to offer a reason for refusing to issue a visa and this is a policy area that is still governed by the principle of sovereignty of each Schengen state. The persons usually included in the SIS database are those who either have a criminal record (even simply defined as a threat to public order) or have possibly been subject to a criminal act, for example, persons whose documents were stolen while visiting or residing in a Schengen country. The Council meeting on 28 and 29 May 2001 confirmed the development of the so-called 'SIS II' by 2006 as a priority. The second generation of the SIS does indeed bring new technical and investigation facilities, such as additional, new identification materials for the member states.
2. A **common list of countries** whose nationals require visas to come into the common territory for short stays (visits up to three months) and a common list of those excluded from the requirement – the definitive black and white lists were achieved in December 1998.
3. A **common format** and set of rules on the issue and meaning of short-stay visas, which have been established through Council Regulations.
4. **Carrier sanctions,** which have also been established.
These elements will be discussed in more detail below.

MELONI[65] considers that the common visa policy is built on three main elements:

[65] See MELONI op. cit., p. 55-57.

1. Harmonization of the Member States' visa requirements.
2. Introduction of a 'uniform' visa – implying mutual recognition of visas issued by the Member States for the purposes of external border crossing and free circulation. This uniform visa was in turn facilitated by:
    a. Establishment of common entry conditions for aliens, and
    b. Common rules and procedures to be followed by the Member States when issuing visas.
3. Common instructions for the Member States' diplomatic and consular posts and consular cooperation at local level.

Not far from the view of MELONI is BACH[66] according to whom the core issues in the negotiations in the field of free movement of persons developed around three main pillars:

1. Harmonization of visa policy for a stay not exceeding three months, to precede a common policy in the field of visas;
2. The common uniform visa; and
3. Common rules for the procedures and conditions for issuing of visas.

Thus the visa policy developed under the Schengen rules was characterized as flexible, as it allowed the individual Member States to retain control over who could obtain a visa to enter their territory.

3.3.1. Who can enter – the conditions

The conditions that an alien should meet in order to be granted access to the Schengen territory are enshrined in Article 5 of the Convention. It provided that the Contracting Parties would grant entry to aliens who*:*

(i) possess a valid travel document;

(ii) can produce documents justifying the purpose and conditions of their visit and proving that they had means of support;

[66] B. BACH, "L'evolution de l'Acquis Schengen en matière de visa depuis 20 ans et situation actuelle", presented at the seminar "Schengen revisité: 20 années d'expérience", 9-11 March 2005, organised by the Luxembourgish Presidency of the EU.

(iii) are not reported on the SIS as persons to be denied entry;

(iv) are not considered a threat to public policy, national security or international relations of any of the Contracting Parties.

Aliens who do not fulfil all these conditions were to be refused visas unless a Contracting Party considered it necessary to derogate from this principle on humanitarian grounds, on grounds of national interest or because of international obligations, in which case it could issue a visa with limited territorial validity, i.e. valid only for its own territory.[67]

Ultimately, it was in the power of each Schengen state to decide to what extent visa applicants were meeting the entry conditions enshrined in Article 5, especially as far as the fourth condition is concerned. The entry conditions determined who could enter Schengen territory and the uniform visa was considered as a way to ensure consistency in the checks prior to the presentation at the border of the foreigner and whether those entry conditions were in fact met. At the same time, the Schengen states still retained the possibility to grant access into their national territories to aliens who did not fulfil the common entry conditions through the issuing of limited territorial validity visas (i.e. national visas).[68]

The fact that this last option was kept open (although it might have undermined the security of other members of the area),[69] can be explained by several considerations: the difference among the states in their recognition of foreign passports; their duty to honour their international law obligations regarding validity of travel documents or access into the national territory and ultimately by the desire of Member States to keep an option which could be important for their individual national interests.

[67] Article 16 Schengen Convention. Chapter 1 shows that today this type of visa accounts for only about 2 % of all visas issued by Schengen member countries. It seems to be used mainly by Greece because of the dispute over the name of Macedonia (or FYROM).

[68] Under Article 18 the Contracting Parties also retained discretion to issue visas for stays exceeding thee months in accordance with their national laws. These, since not granted according to common criteria, did not carry the right of free circulation but permitted the holder, provided certain conditions were satisfied, to transit visa-free though the Schengen states in order to reach the State which issued the visa.

[69] In the absence of internal frontier controls, the territorial limitation of limited territorial validity visas could only be enforced once an alien illegally present in the territory of a Contracting party was caught there.

3.3.2. Who can enter – visa lists

The legal basis for the adoption of common rules on visas is Article 9 of the Schengen Convention which refers to the adoption of the parties of "common arrangements for visas" and to "pursue through a common consent the harmonization of their policies on visas". When there was a common position reached as to the visa status of a particular country, the agreed position could be changed only following common consent. Still the Schengen states kept a certain possibility to derogate from the common rules when "overriding reasons of national policy required an urgent decision". However, in such cases, there was a need for a consultation with the other states, taking into account their interest and the consequences that such a decision can have on them.

With regards to the harmonization of the lists, MELONI claims that the harmonization as foreseen in Schengen was to be total and thus any third country was either to be included on a black visa list, whereby its nationals were required to have a visa to enter Schengen territory, or on a white list, including those countries which were exempt from that requirement.[70] She links this claim to the fact that complete harmonization was a necessary pre-condition for the abolition of internal frontier controls. However, there is no clear legal basis in the text of the Schengen Convention. In principle such a system could also function on the basis of mutual trust and mutual recognition of the visas issued. The fact that actually the Schengen system was operational between 1995 (when the Schengen Convention entered into force) and 1998 (when full harmonization of visa lists was achieved) confirms this view.

Harmonization of visa requirements towards third countries proved to be a difficult issue. Thus in order not to cause unnecessary tensions the Executive Committee developed three distinct lists, including:

1. A white visa list, including all countries whose nationals were exempt from visa requirements in all Schengen countries;

[70] MELONI, op. cit., p.56.

2. A black visa list, including all countries whose nationals were subject to visa requirements in all Schengen states; and
3. A grey list, including countries whose nationals were subject to visa requirements in one or more Schengen countries.

The three lists presented are essentially a picture of the visa policy of the different Schengen states at the time of entry into force of the Convention.

The process of harmonization of the visa policy was laborious, but it continued until 16 December 1998, the date on which the Executive Committee decided on the abolition of the grey list, almost four years after the entry into force of the Convention in March 1995. For this period, the countries could exercise discretion in relations with the countries on the grey list and had only the obligation to notify the other parties to the Convention of their position.

What criteria were used in the construction of the visa list is difficult to judge, as the visa list together with the Common Consular Instructions and the Common Manual which contained it were secret until 2003 when they were finally published. Still, the contents of the list became available at least for those working in this field with the first attempts at the development of a common visa list in the Community framework.

Obviously, the construction of a black list, especially if it is not exhaustive, is easier than reaching an agreement on the white list. For the countries for which the positions of the Schengen states coincide, there is no problem. The problem with the allocation of the rest of the countries can generally be decided by employing two approaches. One can either use as a criterion, for example, the presence of a visa-free agreement with at least one Schengen state, or when there is doubt and no special external relations considerations are in place, put the country on the visa black list.

With the Schengen Convention signed in 1990, by 1992 there was a document on the Essential criteria for including countries on joint lists of countries whose nationals

require visas, adopted by the Ministers and State Secretaries in Madrid on 15 December 1992.[71]

Ultimately, the result of the exercise was the development of a very extensive black visa list, which contained more than 120 countries, compared with the 79 agreed under the Palma Document.

Possibly the criteria used gravitated towards considerations of "immigration and security risks", however the evaluation was strictly national and ultimately, the inclusion of a country on the visa black list was decided without taking into account the potential negative consequences for the bilateral relations of the EU with the countries involved, or the consequences for some member states in terms of creating obstacles for cross border contacts or tourism.

As a result, countries with a wider network of international links and of special relationships (usually based on their colonial history) experienced most of the negative effects of the visa list. With the UK missing from the picture, the two countries with the most to lose were Spain and France. Of course, the actual impact on the individuals from a black list country depended very much on the nationality laws in the countries concerned. As in most cases, the colonial states had a simplified procedure of acquiring citizenship for persons coming from the colonies.[72]

Spain had visa-free access for nationals of the Latin-American countries as part of its policy of forging an "Ibero-American Community of Nations". However this situation changed after the participation of the country into Schengen and visas were

[71] SCH/M (92) 32 rev.

[72] Consider the UK; where apart from British Citizenship, there are different types of semi-British citizenship open to persons from its former colonies. These groups include: British overseas territories citizens who do not have the right of abode in the United Kingdom, British overseas citizens, British subjects who do not have the right of abode in the United Kingdom and British protected persons. See Annex I of Council Regulation No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement.

introduced for Peru and the Dominican Republic (and eventually Colombia and Ecuador) due to problems linked to drug-trafficking and illegal immigration.[73]

In that regard the House of Lords stated in its report on Visas and Control on External Borders that the negative impact of the common visa policy should have been an even more powerful argument against cumulating national visa restrictions based purely on reciprocity or political disapproval.[74]

The development of a common visa policy was considered necessary in the framework of the Schengen cooperation as it was an essential element of the strengthening of external border controls which, could guarantee security after the abolition of internal border controls.

One of the tools deployed to achieve these three principles was a common list of countries whose nationals required visas to come to the common territory for short stays (visits of up to three months); and a common list of those excluded from the requirement.

Short term visas are regulated by Articles 9 to 16 of the Schengen Convention.[75] As far as visa lists were concerned, the objective was full harmonization, thus all countries in the world would have to be included on either the black or the white lists. However, reaching an agreement on this point proved difficult even among the small number of Schengen countries.

Although the Schengen countries' ministers already decided at their meeting in Madrid in mid-December 1992 to develop: (1) basic criteria for the inclusion of third countries in a common list of countries from which persons would need a visa; (2) a uniform visa label, non-counterfeitable, for three-month visas; and (3) to start drawing

[73] CORNELIUS "Spain: the Uneasy Transition from Labour Exporter to Labour Importer" in W. CORNELIUS (ed.), *Controlling Immigration. A Global Perspective*, Stanford University Press, (Stanford, 1994) p.350; PAPADEMETRIOU, op. cit., p. 93-96.

[74] House of Lords Select Committee on the European Communities (1993-1994), Visas and Control of External Borders of the Member States, 14th Report, HL Paper 78, para. 71 and 81 of evidence.

[75] Convention implementing the Schengen agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

up a provisional list of some 120 countries and their various positions as to visas, which would be harmonized as much as possible with the existing list of the Benelux countries, final agreement could not be reached for a long time.[76]

3.3.3. The uniform visa

The Schengen Convention also introduced the concept of a uniform visa. According to Article 10, the uniform visa was valid for the entire Schengen territory for a maximum period of three months. It could be either a visa for a stay or for transit. The uniform visa, according to Article 19, also entitled its holder to circulate freely in the Schengen territory for the period of the visa's validity, provided s/he continued to fulfil the entry conditions.[77]

For the issuing of a uniform visa, it was necessary for the alien to fulfil the common entry conditions, enshrined in Article 5 of the Convention. Moreover, in terms of procedure, the uniform visas were issued according to certain criteria and procedures provided by the Convention or by decision of the Executive Committee.

3.3.4. Schengen Information System (SIS)

The negative condition for granting visa and entry based on Article 5 of the Schengen Convention is that a person should not be reported in the SIS as a person to be denied entry. Thus the SIS contained a common list of persons (aliens) to be denied entry by the Schengen countries.

Article 96 of the Schengen Convention provided for some of the criteria on which national decisions to include an alien in the SIS were to be based:

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[76] In the case of the Netherlands, however, the list was made public in an annex to a report by the Dutch Government to the Parliament. See D'OLIVEIRA AND ULRICH, "Expanding external and shrinking internal borders: Europe's defence mechanisms in the area of free movement, immigration and asylum", in O'KEEFFE AND TWOMEY, *Legal Issues of the Maastricht Treaty*, Chancery Law, (London, 1999).

[77] Such a right of free circulation was also guaranteed to aliens in possession of a residence permit issued by a Contracting party. Such a permit was valid for crossing of the external borders and free circulation for a period of up to three months (Article 21 and 25 of the Schengen Convention).

> 2. Decisions may be based on a threat to public policy or public security or to national security, which the presence of an alien in national territory may pose. This situation may arise in particular in the case of:
> (a) an alien who has been convicted of an offence carrying a penalty involving a deprivation of liberty of at least one year;
> (b) an alien in respect of whom there are serious grounds for believing that s/he has committed serious criminal offences, including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences on the territory of a Contracting Party.
>
> 3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.

The mere fact of using of the word "may" throughout the article to define who could be included in the SIS shows that the intention of the authors was rather to give guidance to the national authorities than to fix strict criteria to be valid throughout the Schengen space. Thus, ultimately, the decision was based on national considerations and on the interpretation in each particular country of terms such as "national security" or "public order".

Many of the possible criteria included in Article 96 were based on facts which could have a specific national interpretation (like for example convictions carrying a penalty of at least one year's imprisonment). Thus, unlike the visa lists, the chosen approach for the SIS was based on mutual recognition of the Member States' public policy and national security concerns, as well as their legislation with regard to denial of entry. Such mutual recognition was again subject to the possibility of derogations based on humanitarian grounds, on grounds of national interest or on international obligations, which resulted in the issue of limited territorial validity visas.[78]

The creation of the SIS and especially the chosen tool of mutual recognition had the effect that an individual who had a particular problem with a specific country, instead of being excluded just from its territory, would now be excluded from all of the Schengen states' territories. Considering the harshness of such a measure, one would expect that enough safeguards had been foreseen to avoid cases of incorrect inclusion in the SIS.

[78] See Article 5(2) Schengen Convention

A 'pure' mutual recognition approach was however refuted by the national courts of some Contracting Parties[79] and later by the ECJ, upon integration of the Schengen acquis into the framework of the European Union.[80] The French Conseil d'Etat ruled that it could review the legality of an entry in the SIS made by the authorities of another Contracting Party by virtue of Article 111 of the Schengen Convention.[81] In Forabosco, the Conseil d'Etat ruled that the German authorities had made an error by including Forabosco in the SIS on the basis that she had been refused asylum in Germany. This was held not to be among the grounds laid down in Article 96 of the Schengen Convention.

"*In this context, it appeared clear that the exclusion of a central judiciary authority entrusted with interpreting the Convention could result in a lack of uniformity of*

[79] See GUILD, op. cit., p. 27.

[80] Case C-503/03 *Commission v. Spain* [2006] ECR I-1097, The action by the Commission was provoked by the situation of two Algerian nationals, both of whom were married to EU nationals and both were refused entry into the Schengen territory and a Shengen visa on the sole grounds that they were persons who were the subject of an alert entered into the SIS for the purposes of refusing them entry. The Court first confirmed that the right of Member State nationals and their spouses to enter and remain on the territory of another Member State is not unconditional. Among the limits laid down or authorized by Community law, Article 2 of Directive 64/221 enables Member States to prohibit nationals of other Member States or their spouses who are nationals of third countries from entering their territory on grounds of public policy or public security (paragraph 43). The Community legislature provides for strict limits when Member States rely on such grounds. Thus a Contracting State may issue an alert for a national of a third country who is the spouse of a Member State national only after establishing that the presence of that person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of Directive 64/221 (paragraphs 50 to 52). The Court held that Spain failed to fulfil its obligations by refusing entry and by refusing to issue a visa for the purpose of entry to third country nationals who were the spouses of Member State nationals, on the sole grounds that they were persons for whom alerts were entered in the Schengen Information System for the purposes of refusing them entry, without first verifying whether the presence of those persons constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

[81] Forabosco, Case 190384, and Hamassaoui, Case 198344, 9 June 1999 (www.legifrance.gouv.fr). In both cases the Conseil d'Etat held that the applicants were entitled to sufficient information regarding their entry in the SIS to enable the national judge to review the lawfulness of the entry. The Conseil d'Etat based these decisions on Article 111(1) of the Schengen Convention which provided that "any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them". For an in-depth analysis see GORTAZAR, "Abolishing Border Controls: Individual Rights and Common Controls of EU External Borders" in GUILD AND HARLOW (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Hart Publishing, (Oxford, 2001), p.138. A similar approach was applied by the Tribunale amministrativo regionale del Lazio, sentenza n. 13164/2001 Ghadban (www.giustizia-amministrativa.it). The Tribunale amministrativo held that the consular authority had a duty to inform the visa applicant of the national or other Member States' dispositions from which his assessment as a "security threat" derived and of the specific list on which his name was entered, particularly in view of the consequences faced by an individual in case of erroneous inclusion in the SIS.

national entry conditions, which could undermine the application of mutual recognition and thus the functioning of the whole system."[82]

3.3.5. The procedure – common conditions and procedures for issuing visas

Given the development of a uniform visa, there was also a need for common conditions and procedures for issuing it. Certain basic rules were included in the text of the Schengen Convention itself. As far as the issuing authorities were concerned, it provided that the diplomatic and consular authorities of the Contracting Party of the main destination or, where this could not be determined, first entry were to be responsible for issuing the uniform visa.[83]

There were also detailed rules for the affixing of uniform visas on travel documents.[84] Their main objective was to regulate the cases in which there was divergence among the Schengen states related to the documents they considered as passports and the entities they considered capable of issuing them. Thus in cases when a travel document was valid only for one or more (but not all Contracting Parties) only a visa with limited territorial validity but not a uniform visa could be issued.

The Executive Committee was to agree, unanimously, the list of passports and travel documents to which a visa could be affixed and the list of countries that were not recognized. Such lists were without prejudice to the Member States' recognition of countries and entities.[85]

The Convention left other criteria and procedures to be determined by the Executive Committee at a later stage. The Executive Committee was to specify cases where the

[82] See STAPLES, "Adjudicating the External Schengen Border" in GROENENDIJK, GUILD AND MINDERHOUD (eds), *In Search of Europe's Borders*, Kluwer (The Hague, 2003), pp. 246 and 248.

[83] Article 12 Schengen Convention. The Executive Committee also adopted decisions on the criteria for determining the state of main destination and on the rights and obligations between representing and represented States in the context of visa issue. See Decisions of the Executive Committee of 14 December 1993 extending the uniform visa (SCH/Com-ex(93) 21) and of 27 June 1996 on the principles for issuing Schengen visas in accordance with Article 30(1)(a) of the Schengen Convention (SCH/Com-ex(96) 13 rev 1), OJ 2000 L 239/18 and 180.

[84] Articles 13-14 of the Schengen Convention.

[85] See Article 17. See also the Manual of documents to which a visa may be affixed, and Annex 11 (criteria for travel documents to which a visa may be affixed) of the CCI

issue of a uniform visa was subject to prior consultation of the central authorities of the issuing Contracting Party or any other Contracting Party. Further rules to be agreed within the Executive Committee included rules on the examination of visa application, on the issue of visas at borders, and on the visa-issuing authorities.[86]

The implementation of these latter rules was entrusted to the consular authorities of the Schengen states. And in order to ensure uniformity in implementation some common rules were adopted in the form of a Common Consular Instruction (CCI) and Common Manual (CM).

The first instrument to ensure uniformity was the Common Consular Instructions (CCI).[87] The CCI contained the Convention articles and the Executive Committee's decisions on the common conditions and procedures for issuing visas.

The CCI was supposed to be the tool through which the consular authorities could implement the principle of mutual recognition of conditions for the issuing of visas and at the same time to implement the country concerns with regard to national security, public order and international relations.

Thus, the CCI naturally contained the black and white lists, the airport transit black list, the list of national documents entitling entry without a visa (such as residence permits and cards issued by foreign ministries to members of international organizations and foreign diplomats), and the Manual of documents to which a visa could be affixed.[88]

Further, they laid down an obligation for the consular authorities to consult the SIS before a uniform visa was issued. They also provided a list of nationalities on which the central authorities of one or more Contracting Parties had to be consulted before a

[86] Article 17 of the Schengen Convention.

[87] The Common Consular Instructions, as contained in Decision of the Executive Committee of 28 April 1999 "withdrawal of old versions of the Common Manual and the Common Consular Instructions and adoption of new versions" (SCH/Com-ex (99)13), were published in the Official Journal after the Schengen *acquis* was incorporated in to the European Union legal order in May 1999 by virtue of the Protocol "integrating the Schengen *acquis* into the framework of the European Union" attached to the Treaty of Amsterdam. For consolidated version of the CCI, see O.J. 2002, C 313/1.

[88] Annexes 1,3 and 4

uniform visa was issued. This list, contained in Annex 5, was classified as "confidential" and not published.[89]

The CCI also contained certain rules aimed at improving security generally. Thus, they laid down some criteria in relation to the examination of visa applications including a requirement for consular authorities to be particularly vigilant in relation to 'risk' categories (unemployed persons or persons with no regular income) and with regard to verification of documents.[90] They provided that in the case where a visa application was lodged with the consular post in a state which was not the applicant's state of residence and a risk of illegal immigration was observed, the uniform visa could be issued only after consultation with the consular mission in the applicant's state of residence or with the central authorities.[91]

The CCI also laid down requirements with regard to the administrative management and organization of the visa sections in diplomatic or consular posts, particularly security measures on blank visa storage and measures to ensure that the personnel responsible for issuing visas was not exposed to local pressure.[92]

The second instrument to ensure the uniform implementation of the common visa policy allowed for the strengthening of consular cooperation at local level.[93] Local consular cooperation involved an exchange of information considered important for a uniform interpretation of the CCI, to ensure that the interests of all the contracting states were known and taken into account, and to prevent visa shopping in general (in particular through the exchange of information on the use of false documents, illegal immigration routes, clearly ill-founded applications and the identification of bona fide applicants).

[89] For example, following events in East Timor, Portugal requested that Indonesia nationals be issued only with limited territorial validity visas (excluding the visa validity for Portugal) or, in case the applicant for a visa intended to enter or transit Portugal, its central authority was to be consulted before a visa could be issued. See Decision of Executive Committee of 5 May 1995 on common visa policy (SCH/Com-ex (95)), OJ 2000 L 239.

[90] Parts III and V of Common Consular Instructions.

[91] See Part II and Annex 5 of Common Consular Instructions.

[92] Part VII of Common Consular Instructions.

[93] See Part VIII of Common Consular Instructions.

The practical measures to prevent visa shopping also included the regular exchange of information on visas issued and refused, through which consular authorities were expected to detect trends and shifts in applications from one Contracting Party to another and make the necessary recommendations to their central authorities.[94] Further they included the practice of stamping the passports of visa applicants when visa applications were lodged in order to prevent multiple or successive applications.[95] Moreover, document advisers were from time to time sent to selected consular posts in order to assist them with the detection of false documents.[96]

Arrangements for monitoring the implementation of the CCI constituted a further and essential instrument to ensure uniformity.[97]

Such monitoring was the responsibility of a Standing Committee. This was composed of one representative for each contracting party as well as the necessary seconded experts (the Commission was also included as an observer). With regard to the implementation of the CCI, the standing Committee was in particular to evaluate the application of the provisions for prior consultation, consultation of the SIS and storage of blank visa stickers. In relation to applicant countries, it was also to assess whether the conditions governing the issue of visas corresponded to those of the CCI, while, with regard to countries already applying the Convention, it was to make an assessment on the issue of limited territorial validity visas (quantity, target groups, and grounds for issue).

3.4. Interim conclusions

The five countries which started the Schengen group did so on an intergovernmental basis partially because it proved impossible to reach an agreement with the UK and

[94] See Decision of the Executive Committee of 21 April 1998 on the exchange of statistics on issued visas (SCH/Com-ex (98)12, O.J. 2000, L 239/173.

[95] See Decision of the Executive Committee of 23 June 1998 on the stamping of passports of visa applicants (SCH/Com-ex (98) 21), O.J. 2000, L 239/200.

[96] Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers 'SCH-Com-ex (98) 59 rev), O.J. 2000, L 239/308.

[97] See Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH-Com-ex (98) 26 def), O.J. 2000, L 239/138. On monitoring implementation see Decision of the Executive Committee of 21 April 1998 on the activities of the Task Force (SCH-Com-ex (98) 1 rev 2), O.J. 2000, L 239/191.

Denmark on the principle of the abolition of internal controls. Another reason for this choice was that they did not trust the remaining member countries. By starting with a more restricted group outside the EC framework they were able to set the conditions on which the others could later join.

However, the Schengen framework did not represent 'pure intergovernmentalism'. Its success was not based on the initial Schengen agreement with its broad principles, but the Implementing Convention with its detailed provisions and the creation of a mechanism (the Executive Committee and the secretariat) which allowed them to take literally hundreds of detailed decisions that were necessary to make the visa-free travel area work. In this sense Schengen resembled more the framework for international trade, which also has an institution (the WTO) with a secretariat to take many detailed decisions (albeit only by unanimity) that are necessary to make the broad principle of multilateral trade work.

The process towards the full communitarization of visa policy via Maastricht to Amsterdam discussed in Chapter 5 was thus in practice more one of degree than of principle.

4. Conclusions

The visa list constitutes the core of every national visa policy. As described in Chapter 1 it evolved as the embodiment of the ultimate sovereignty of a state – to decide on whom to allow onto its territory and whom not to. While the other elements of a visa policy, like the format of a visa, the entry conditions, and the procedures for the issuing of a visa are also important, it is the fact that a person is or is not on the country visa list that ultimately puts in motion the respective provisions of the national visa rules.

The importance of the visa lists is further confirmed by the special national sensitivities, which ultimately led to the decision on the inclusion or exclusion of a particular country from the list. As was demonstrated earlier, the main determining factor was foreign policy, based on the one hand on reciprocity and on the other on the particular relationships with the country concerned. Those special relationships

can vary greatly depending on the historical and economic background of each country. Thus, one could assume that attempting a common visa list could be successful in cases when those backgrounds are similar if not identical.

An additional aspect influencing the contents of a visa list (now dominant) is the security perception of a danger associated with a particular country. This perception is also strictly national and what could be perceived as a threat to national security in one country would not necessarily be so in another. The alignment of such security concerns can also be considered as an additional challenge to attempted development of common visa lists.

Now, once it is established that having common visa lists might be considered difficult due to the importance attached to them as an expression of state sovereignty and the differences resulting from criteria used both in foreign policy and security, the question arises as to whether, despite the difficulties, one should attempt such 'commonality'. Or in other words, in the context of the free movement of persons and abolition of internal frontiers, is it possible to have a passport union, a common travel area or other forms of facilitated travel without effectively developing a common visa list?

It is not the passport-free movement of own nationals or residents that poses a problem. What is problematic is the notion of which third country nationals should be allowed visa-free access to the territory. The problem being that once on the territory, even though subject to carrying an identity document in case of a control, there is no way of preventing and controlling the movement of the third country national unless border controls are imposed. And those controls will inevitably also touch upon the citizens and residents group, as all persons would need to undergo a check for the simple reason of differentiating the various groups of travellers.

Finding a way around such a problem can be achieved either through mutual recognition or through the development of common visa lists of the participating states. While, as we discussed above, developing a common list might require special diplomatic skills and a long decision-making period before the lists are negotiated and then put into practice, the mutual recognition option seems to be the obvious solution.

Once a certain level of trust is established among the states involved, either based on close economic cooperation or common history, the introduction of the mutual recognition of visas seems to be the logical path to follow.

The practice on this issue of the three regional travel areas that existed prior to EU involvement in this issue is diverse. In the case of the Common Travel Area between the United Kingdom and Ireland,[98] the intention was to create an area within which people can travel without frontier controls and this is achieved through domestic legislation in the UK and a parallel one in the Republic of Ireland. Thus, the visa lists of both countries are not harmonized but follow the national priorities of both states. The lack of harmonization did not prevent the proper functioning of the area.

The approach chosen by the Nordic Passport Union was different. The initial provisions were for time-limited exemptions introduced for the citizens of Denmark, Finland, Norway and Sweden in 1952. However, at this stage the passport-free movement was limited only to the citizens of the countries concerned, and thus there was no consideration of possible rules on visa requirements. The consequent developments led to an expansion of the rights on nationals and the inclusion of third-country nationals into the groups of persons allowed to travel directly from one Nordic country to another without undergoing passport controls. The 1957 Passport Control Agreement which introduced this novelty, as a consequence obliged the contracting states to establish passport controls at their external borders according to common guidelines. However, in the preparatory work towards this agreement it was realized that in order to compensate for the absence of systematic border controls, a system of flanking measures should be adopted. One of those measures was identified as the setting up of identical visa requirements. Thus, the 1957 Passport Control Agreement contains in its preamble the intention of the governments to apply identical visa requirements. However, this effect was achieved not through the creation of a common list, but through consultations.

However, within the much larger and more diverse Schengen group of states, such a level of mutual trust did not exist; a common visa list was thus required. Each country

[98] The Common Travel Area comprises the United Kingdom (i.e. England and Wales, Scotland and Northern Ireland), the Channel Islands, the Isle of Man and the Republic of Ireland.

could defend its particular position and make sure that its interests were protected by participating in the drawing up of the common list. Thus, parallel to the discussion on lifting internal border controls as a way to achieve the free movement of persons, discussion on the possible harmonization of the visa lists among the EC Member States started as early as 1986.

CHAPTER 4 – NATIONAL CONCERNS AND INTERGOVERNMENTAL COOPERATION – LIFE BEFORE SUPRANATIONALISM

The purpose of this chapter is to identify the conditions under which special arrangements were allowed in the intergovernmental period of Schengen cooperation, based on national concerns linked to visas.

The founding members of Schengen had designed the Convention in such a way that it did not necessarily address the concerns of other countries wishing to join at a later stage. As the negotiations on accession to the Convention advanced, it became clear that some adjustments to the system would be necessary to accommodate the special situations in which some of the countries found themselves. The most striking example is that of Denmark. It wanted to join the Schengen group but at the same time did not want to abandon the achievements of the Nordic Passport Union. This consideration pushed the Schengen countries to seek a solution in the form of integrating the remaining Nordic countries one way or another into the Schengen cooperation. Similar concerns were raised by Spain and Portugal, both of which wanted to maintain previously existing special arrangements with third countries.

This chapter will analyze the accessions to the Schengen Convention that took place before the final incorporation of the Schengen *acquis* into EU Law. It will look at the relationship between the 'insiders' (Schengen members) and 'outsiders' (acceding Schengen states) and how this relationship changed to accommodate the special links to third countries.

1. Accession to Schengen

1.1 Basic principles

As an intergovernmental treaty, the Schengen Convention contains rules allowing the accession of third parties. In general, these rules follow the provisions of the Vienna Convention on the Law of the Treaties as a procedure, but they have limitations as far as possible parties to the Convention are concerned.

Article 140 of the Schengen Convention regulates the procedure for the accession of new parties. The possibility to accede to Schengen is only open to the Member States of the European Communities and the accession is subject to ratification by both the acceding state and the other parties to the Convention. The agreement enters into force only after all ratifications have been completed and the final instrument of ratification has been registered with the government of Luxembourg; the depository of the Convention.

There had been lengthy discussions as to whether the wording of Article 140 implies that only countries that are members of the EU can accede to Schengen. It is clear that the initial interpretation was such. That was one of the reasons why, when Denmark requested the integration of the remaining members of the Nordic Passport Union into Schengen, an innovative solution had to be found for Iceland and Norway in the form of a special cooperation agreement.[1]

Almost immediately following the signature of the Convention on 19 June 1990, there was a move towards the expansion of its membership. Until the date of the incorporation of the Schengen *acquis* into the framework of the EU, eight countries had followed the prescribed accession procedure and joined the Schengen group. The table below shows the dates of signature of the agreements, the dates of entry into force of the agreements and the dates of accession to the EU.

Table 4.1. Dates of accession to Schengen and the EU of eight EU Member States

Country	Date of signature of Accession agreement to Schengen	Year of accession to the EU
Italy	27 November 1990	1957
Spain	25 June 1991	1986
Portugal	25 June 1991	1986
Greece	6 November 1992	1981

[1] For further details, see L. BAY LARSEN, "Schengen, the Third Pillar and Nordic Cooperation", in M. DEN BOER (ed.), *The Implementation of Schengen, First the Widening, Now the Deepening*, European Institute of Public Administration, (Maastricht, 1997), pp.17-23.

Austria	28 April 1995	1995
Denmark	19 December 1996	1973
Finland	19 December 1996	1995
Sweden	19 December 1996	1995

Source: Own compilation based on the Schengen *acquis*, O.J. L 239, 22.9.2000.

1.2. Structure of the accession agreements

All accession agreements have a similar structure: they contain the text of the agreement itself and the final act and declaration by the ministers and state secretaries. The Accession agreement contains six articles: Article 1 declares the accession to the 1990 Convention; Articles 2 to 4 specify the national authorities that are competent to perform duties within the framework of the Convention, mainly in the field of police cooperation. These include the officers allowed to continue a surveillance operation across the border of a contracting party (Article 2); the officers allowed to perform 'hot pursuit'[2] across the border (Article 3), including the statement for bilateral negotiations of a procedure to govern the hot pursuit; and the competent ministry in the field of extradition (Article 4). The following two articles deal with the legal procedures for ratification and entry into force of the agreement, as well as the addition of an authentic linguistic version of the Convention in the language of the acceding state. It is followed by a final act, also with a standard structure containing a number of joint or unilateral declarations on aspects of the agreement. Part one of the final act includes the subscription of each acceding party to the joint declaration, taking note of the unilateral ones, as well as technical information related to the effects and language of the final act.

Part two contains the joint declarations to the agreement. It includes three declarations common to all agreements: firstly, it is a joint declaration obliging the parties to the

[2] The definition of "hot pursuit" and the conditions under which it is allowed is provided in Article 41 of the Schengen Convention. This situation arises when officers of one of the contracting parties who are pursuing in their country an individual caught in the act of committing or of participating in one of the offences referred to in paragraph 4 of the same article (e.g. murder, manslaughter, rape, arson, extortion, etc.) are authorised to continue pursuit in the territory of another contracting party without the latter's prior authorisation where, given the particular urgency of the situation, it is not possible to notify the competent authorities of the other contracting party by one of the means provided by the Schengen Convention prior to the entry into that territory or where these authorities are unable to reach the scene in time to take over the pursuit.

agreement before its entry into force to inform each other of all circumstances that could have a significant bearing on the areas covered by the 1990 Convention (it refers to different articles of the accession agreement, depending on the country).
The second joint declaration is on Article 9(2) of the Convention itself, defining the meaning of "common visa arrangements". The third joint declaration is on data protection.

In addition to this "minimum content", some agreements contain additional joint declarations: Greece (joint declaration on 'hot pursuit'[3] and joint declaration on Mount Athos[4]); Denmark (joint declaration on the 1996 Convention on extradition[5]); Finland (also a joint declaration on the 1996 Convention on extradition[6] but the agreement lacks the declaration on the data protection); Sweden (in a similar situation to Finland with a joint declaration on the 1996 Convention on extradition[7], but lacking one on data protection).

[3] The Joint Declaration on Article 41 of 1990 Convention relates to the fact that one of the general conditions for carrying out "hot pursuit" is that "pursuit shall be solely over land borders" (Article 41 (5)(b)). As at the time of its accession to the Schengen Convention, Greece did not have land borders with any of the other contracting parties, the Joint Declaration states that "in view of the geographical situation of the Hellenic Republic, the provisions of Article 41(5)(b) preclude the application of Article 41 in relations between the Hellenic Republic and the other contracting parties". Therefore, Greece did not designate authorities within the meaning of Article 41 (7) or make a declaration within the meaning of Article 41 (9).

[4] The Joint Declaration concerning Mount Athos recognizes that "the special status granted to Mount Athos, as guaranteed by Article 105 of the Hellenic Constitution and the Charter of Mount Athos, is justified exclusively on grounds of a spiritual and religious nature, the contracting parties will ensure that this status is taken into account in the application and subsequent preparation of the provisions of the 1985 Agreement and the 1990 Convention."

[5] The Joint Declaration on the convention drawn up on the basis of Article K.3 of the Treaty of the European Union relating to extradition states that "the States party to the 1990 Convention confirm that Article 5(4) of the convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to extradition between the Member States of the European Union, signed at Dublin on 27 September 1996, and their respective declarations annexed to the said convention, shall apply within the framework of the 1990 Convention." The aim of the 1996 Convention relating to extradition between the Member States of the European Union was to facilitate extradition between the Member States in certain cases. It supplemented the other international agreements such as the European Convention on Extradition 1957, the European Convention on the Suppression of Terrorism 1977 and the European Union Convention on Simplified Extradition Procedure 1995. Although the Convention has been replaced since 1 January 2004 by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [Official Journal L 190 of 18.7.2002], it can still be applied in the few cases where the European arrest warrant cannot be used. But it entered into force between only twelve Member States on 29 June 2005. For further information on the Convention see: Acquis of the European Union under Title IV of the TEC and Title VI of the TEU, Consolidated versions, available at: http://ec.europa.eu/justice_home/doc_centre/enlargement/acquis/doc_enlarge_acquis_en.htm

[6] The text of the Joint Declaration is equivalent to the joint declaration in the Danish agreement.

[7] The text of the Joint Declaration is equivalent to the joint declaration in the Danish agreement.

The third part of the Final Acts of the Accession Agreements contains the unilateral declarations of the parties. These reflect the particular case of each country, regarding political organization, judicial structure and social and historical sensitivities.

Table 4.2. Declarations in Parts III of the Final acts of the Accession Agreements to the Schengen Convention of eight EU Member States

Country	Declarations
Italy	None
Spain	1. Declaration on the towns of Ceuta and Melilla 2. Declaration on the application of the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition 3. Declaration on Article 121 of the 1990 Convention 4. Declaration on the accession agreement of the Portuguese Republic to the 1990 Convention.
Portugal	1. Declaration on Brazilian nationals entering Portugal under the Visa Waiver Agreement between Portugal and Brazil of 9 August 1960 2. Declaration on the European Convention on Mutual Assistance in Criminal Matters 3. Declaration on the Missile Technology Control Regime 4. Declaration on Article 121 of the 1990 Convention 5. Declaration on the accession agreement of the Kingdom of Spain to the 1990 Convention
Greece	1. Declaration by the Hellenic Republic on the agreements on the accession of the Italian Republic, the Kingdom of Spain and the Portuguese Republic 2. Declaration by the Hellenic Republic on mutual assistance in criminal matters 3. Declaration on Article 121 of the 1990 Convention
Austria	None
Denmark	1. Declaration by the Kingdom of Denmark on the agreements on the accession of the Republic of Finland and the Kingdom of Sweden to the 1990 Convention
Finland	1. Declaration by the Republic of Finland on the agreements on the accession of the Kingdom of Denmark and the Kingdom of Sweden to the 1990 Convention 2. Declaration by the government of the Republic of Finland on the Åland Islands
Sweden	1. Declaration by the Kingdom of Sweden on the accession agreements of the Kingdom of Denmark and the Republic of Finland to the 1990

Source: Own compilation based on the Schengen *acquis*, as published in OJ L 239, 22.9.2000

The table above shows that the unilateral declarations can be divided into several distinct groups. A first type, the majority, deals with the recognition of the accession

of other states to the 1990 Convention. All final acts have such a declaration with the exception of Italy (the first acceding country) and Austria (the first country to join after the entry into force of the Convention. The second type of declaration can be found only in the agreements signed before 1995 and include the declarations on the European Convention on Mutual Assistance in Criminal Matters (Spain, Portugal and Greece), taking on the obligation to ratify the Convention in question. The third type of declaration, typical of all early accession agreements, is linked to Article 121 of the 1990 Convention, dealing with exceptions to the obligation of waiving the plant health checks and requirements. There is also a declaration on the Missile Technology Control Regime on the side of Portugal, taking on the obligation to join this regime at the latest on the date of entry into force of the 1990 Convention, in the framework of Article 123 of the Convention (rules for exports of strategic industrial products).

Thus, we are left with only three declarations related to certain geographical regions: Spain – Ceuta and Melilla, Portugal – Brazil (or Brazilian nationals) and Finland (Åland Islands);[8] two of which will be studied below in some detail.

The case of Finland in fact only refers to the Åland islands. When Finland joined the European Community in 1995, a separate referendum and the consent of the Åland Parliament was necessary. However, the consent was granted only after agreement was reached on the inclusion of a special Protocol to the Accession Treaty.[9] Besides confirming the Åland Islands' special status under international law, the Protocol also provided for special rules related to the purchase of real estate and the right to conduct

[8] The Åland Islands are an autonomous, demilitarized, Swedish-speaking region of Finland that consist of more than 6500 islands, only 65 of which are inhabited, with a total population of 26,200.[8] At the beginning of the 20th century, after a series of disputes between Finland, Russia and Sweden relating to the status of the islands, the so-called "Åland question" was referred to the League of Nations. According to a compromise presented by the Council of the League in 1921, Finland was granted sovereignty over the Åland Islands, accompanied by guarantees to the population for their Swedish language, culture, local customs and system of self-governance. In order to guarantee the security of Sweden, the League proposed an additional agreement on demilitarization and neutralization. Legally, the above decisions were shaped into an Autonomy Act of 1920 (later amended in 1922, 1951 and 1993).[8] According to the Act, foreign affairs are not transferred to the Åland Government but remain the competence of the Finnish State. However, when Finland enters into agreements, containing provisions that relate to areas of competence of the Åland Islands, the consent of the Åland Parliament is necessary, to ensure their validity on the territory of the islands.

[9] Protocol 2 to the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, O.J. 1994, C 241.

business, as well as stating that the islands should be considered as a third territory with respect to indirect taxation:

> The Republic of Finland hereby declares that the obligations arising from Article 2 of Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is found relating to the Åland Islands shall be complied with when implementing the 1990 Convention.

Article 2 of Protocol 2, mentioned in the text above, grants exception to the rules governing the taxation and excise duties, and thus is not directly linked to the visa policy and border control aspects of the Schengen Convention, which are the focus of the present investigation. Therefore, we may conclude that although the Finnish Declaration to the Final Act of the Accession Agreement to the Schengen Convention contains an exception linked to a particular part of Finnish territory, it does not present a deviation to the general Schengen rules on visa and border controls.

When Finland decided to accede to the Schengen Convention one year after accession to the EC there was need for an acknowledgement of the special status of the islands. This was achieved through a unilateral declaration of the type analyzed in the preceding pages. The exception already granted within the framework of the EC Accession Treaties was extended to include the application of the 1990 Convention.

1.3. Interim conclusions

Eight countries joined the Schengen area during the period from 1990, when the Convention was signed, to 1997, when the Schengen *acquis* was incorporated into the EU framework. Their accession agreements follow a similar structure and provide for the inclusion of unilateral declarations linked to specific concerns of the acceding states. Although some of the declarations address similar problems and thus have an almost identical text, there are three cases (Spain, Portugal and Finland) in which they are specific to the concerns of the individual countries involved. The analysis of the case of Finland showed that although it provides for an exception to the general rules linked to a part of the state territory, this was not linked to the visa and border control aspects of the Schengen Convention.

In contrast to the Finnish case, both the Spanish and the Portuguese declarations have a clear reference in their texts to the visa and border controls aspects of Schengen, and since they have the potential to provide an interesting example of the flexible application of the Schengen rules, they will be the object of a more detailed analysis in the next two sections.

Since the beginning of the functioning of the Schengen system there was the possibility for its flexible application. This flexibility has two general legal sources. One is based on the initial inter-governmental character of the Schengen Agreement, which allowed for accession to the agreement based on certain country specific conditions embodied in declarations to the final acts. The other possibility for flexible application stems from the principles on which the system is built, thus, despite the setting up of common rules, the means of their application at national level could be used to achieve specific national goals. The mechanism of both these means of flexible application will be explored in this thesis.

This chapter studies a set of two cases in which some flexible application rules were agreed. Based on the Schengen accession agreements,[10] two countries are singled out – Portugal and Spain. Both case studies follow a similar structure, starting from the historical and geographical background of the case in question, to the legal analysis of the respective national rules that implement the flexible arrangement. The arrangement is evaluated in the framework of the European rules on entry and visas. Finally, some conclusions are offered, also based on the practical application of the measure.

Chapter 6 studies one further case of the flexible application of the Schengen rules; not based on any intergovernmental treaty, but rather based on exploiting certain areas of competence that lie between the European and national spheres.[11]

[10] See Schengen *acquis*, O.J. 2000, L 239.

[11] Chapter 6 concentrates on Greece. Greece has been chosen because it was one of the few Member States which, at the date of its accession to Schengen, had (and still has) a significant minority in a neighbouring non-EU state with a common land border; a situation resembling the one now faced by the majority of the 'new' Central and East European states. Thus, its experience in finding appropriate national legal measures to facilitate contacts with the minority without going against the Schengen rules is an interesting example of the flexible application of the Schengen system.

2. The case of Portugal and its special relations with Brazil

The present section will analyze the unilateral declaration attached to Part III of the Final Act of the Accession Agreement of Portugal to the 1990 Schengen Convention. Starting from the text of the declaration and its historical and legal background, the effects of its application and its ultimate usefulness will be assessed. The question this section will address is whether, in the case of Portugal, we can speak of a flexible application of the Schengen rules, and if so why it was introduced, the effects of this flexibility and the conditions under which these effects were achieved.

2.1. The Declaration

The first unilateral declaration made by Portugal in Part III of the Final Act of the Accession Agreement to the Schengen Convention reads as follows:

> Declaration on Brazilian nationals entering Portugal under the Visa Waiver Agreement between Portugal and Brazil of 9 August 1960.
>
> The Government of the Portuguese Republic undertakes to readmit to its territory Brazilian nationals who, having entered the territories of the Contracting Parties via Portugal under the Visa Waiver Agreement between Portugal and Brazil are intercepted in the territories of the Contracting Parties after the period referred to in Article 20(1) of the 1990 Convention has expired.
>
> The Government of the Portuguese Republic undertakes to admit Brazilian nationals only in so far as they fulfil the conditions laid down in Article 5 of the 1990 Convention and to take all steps to ensure that their travel documents are stamped when they cross the external borders.

At first sight, it might seem that the above text does not provide for an exception to the general visa rules established under the Schengen Convention. It only refers to a bilateral treaty on visas, but does not mention changes in its validity, whether it will continue its legal existence or whether it will be denounced once the common visa rules are in force. The text would suggest that, notwithstanding any changes in bilateral relations on visas between Portugal and Brazil, it aims to create safeguards/guarantees for the remaining Schengen members. Such a move recalls the compensatory internal measures foreseen in Schengen itself. As the other Schengen members do not have any control over the way the Portuguese visa policy is executed in the case of Brazilian nationals, the only means of corrective action they have is to require the readmission of those who have entered their territory from Portugal and no

longer have the right to stay there. However, the exact significance of the Protocol cannot be judged without analysis of its legal background.

2.2. The Visa Waiver Agreement between Portugal and Brazil[12]

The agreement mentioned in the Protocol is part of a comprehensive system of international cooperation, based initially on Portugal's colonial past and later on the Portuguese language. The Constitution of 1976[13] states in paragraph 4 of Article 7 on International Relations that "Portugal maintains special bonds of friendship and cooperation with the Portuguese-speaking countries". This general declaration is further developed in the text of Article 15 on Aliens and Stateless persons, in the part dealing with Fundamental Rights and Duties. Article 15 (3) states that:

> Citizens of Portuguese-speaking countries may, by international convention and subject to reciprocity, be granted rights not otherwise conferred to aliens, except the right of access to membership of the organs of supreme authority and the organs of self-government of the autonomous regions, service in the armed forces, and access to the diplomatic service.

The two underlying themes of the constitutional texts, that of the "special bonds" and the "equality" of citizens of Portugal and other Portuguese-speaking countries, can be found in earlier legal acts and bilateral agreements. Generally, similar types of agreement are signed with all of the countries belonging to the Community of Portuguese-speaking countries (CPLP),[14] but since it only made a declaration referring to the agreement with Brazil when Portugal joined Schengen, the analysis will concentrate only on Brazilian-Portuguese relations.

Even before 1976, there was a notable tradition of bilateral agreements between Brazil and Portugal.[15] The Treaty of Friendship and Consultation of 1953 states that each of the two states agreed to allow the establishment of residence on its territory by nationals of the other party. More importantly, in the field of 'equality of treatment' a

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[12] Acordo de Supressao de Vistos de 9 Agosto 1960 [Agreement on Abolition of Visas, 9 August 1960].

[13] Adopted on 2 April 1976, available at http://www.oefre.unibe.ch/law/icl/po00000_.html.

[14] Comunidade dos Paises de Lingua Portuguesa (CPLP). Member States include Angola, Brazil, Cabo Verde, Guinea-Bissau, Mozambique, Portugal, Sao Tome e Principe and Timor. For more information on the status and the activities of the organization, see www.cplp.org

[15] For a more detailed account see: CARDOSA CLAUDIA, "Uma nova era na cooperaçaõ entre Portugal e Brasil", (2000), available at http://portugalbrasil.sapo.pt.

special convention was signed in 1971; the Convention on the Equality of Rights and Duties of Brazilians and Portuguese. Its Article 1 states that: "*The Portuguese in Brazil and the Brazilians in Portugal will enjoy equality of rights and respective duties as those guaranteed to the nationals of the respective country*". The implementation of the convention was further elaborated through a national law[16] in 1972. However, the latest addition to the system of bilateral agreements is the Treaty on Friendship, Cooperation and Consultation of the year 2000.[17] Apart from providing a comprehensive overview of the variety of agreements already in place between the two countries, whose provisions the new Treaty incorporates, it is a perfect demonstration of the depth of economic and social ties between the two states. The new Treaty includes provisions for economic and cultural cooperation, through the creation of special consultative bodies to provisions dealing with the protection of the environment, social security, judicial and public services cooperation[18]. More importantly for the purposes of the present study, the Status of Equality is again confirmed, and those who benefit from it can receive identity documents of equal status to those of the respective nationals, mentioning the nationality of the holder with a reference to the Treaty of 2000[19]. Moreover, the Treaty has as one of its objectives the adoption of a new regime for the entry and residence of the Portuguese in Brazil and the Brazilians in Portugal[20].

Looking at the scope of the bilateral cooperation between Brazil and Portugal, it is without doubt that the intention of both parties was to go beyond the standard 'cooperation agreement' and in reality place their respective citizens on an equal footing. Some Portuguese scholars[21] evaluate the Treaty as the instrument that embodies the accumulated cultural and economic potential over five centuries. Such sentiments help explain the insistence of Portugal when acceding to Schengen to keep

[16] Decreto-lei n° 126/72 que establece o regime de execução de Convenção sobre Igualidade.

[17] Tratado de Amizade, Cooperação e Consulta entre o Brasil e Portugal, available at: http://www2.mre.gov.br/dai/b_port_139_3927.htm

[18] See for example Title III on cultural cooperation, science and technology, Title IV on economic and financial cooperation and Title V on cooperation in other areas, among which environment and planning, social security, health and justice.

[19] Articles 12 to 22 of the Treaty on Friendship, Cooperation and Consultation

[20] Articles 6 to 11 of the Treaty on Friendship, Cooperation and Consultation

[21] See, CARDOSA CLAUDIA, "Uma nova era na cooperaçaõ entre Portugal e Brasil", (2000), available at http://portugalbrasil.sapo.pt

the special regime of Brazilian nationals with regard to visas and entry, even if that meant taking on additional obligations.

2.3. Visas

Looking specifically at the agreements between Portugal and Brazil in matters of visas, it is clear that in this particular field there are a number of agreements over the years, starting in the 1950s, which have evolved but kept to the same basic philosophy. The two basic agreements preceding the accession to Schengen are: the Agreement between the United States of Brazil and Portugal on the waiving of visas and the special diplomatic passports of 1951[22] and the Agreement on Visas and Common Passport between Brazil and Portugal of 1960.[23]

The 1960 Agreement, which is the one mentioned in the Protocol, has two main principles that deviate from the general Schengen rules. Firstly, it provides for visa-free access to the Portuguese territory to all Brazilians for a stay of up to six months (while the Schengen short-stay visa allows a stay of only up to 90 days). Secondly, access to the territory is granted upon presentation of a Brazilian passport, with no need to meet any further requirements (unlike the extensive list to be found in Article 5 of the Schengen Convention). Considering these substantial differences between the Portuguese national regime and the common Schengen one, it is not surprising that the other parties to the Schengen Convention insisted on the creation of a compensatory mechanism. This was the background to the text of the Declaration to the Final Act of the Portuguese Action to Schengen.

2.4. Legal analysis of the Declaration

Before discussing the legal characteristics of the declaration, it is necessary to mention that at the time of drafting of declaration (1991) none of the Schengen tools

[22] Acordo entre os Estados Unidos do Brasil e Portugal para supressão de Vistos e passaportes diplomáticos especiais, celebrado em Lisboa, a 15 de Octubro de 1951, por troca de notas. [Agreement between the United States of Brazil and Portugal on abolition of visas for diplomatic and special passports, signed in Lisbon on 15 October 1951, by exchange of letters].

[23] Acordo sobre vistos e passaportes comuns entre o Brasil e Portugal, concluído em Lisboa, por troca de notas, a 9 de Agosto de 1960. [Agreement on common visa and passports between Brazil and Portugal, concluded in Lisbon, by exchange of notes on 9 August 1960].

on which the whole system is based today was in place. There was no common visa list, nor any common border control standards and the Convention itself entered into force only in 1995. The Declaration is unilateral and thus only Portugal takes on obligations while no apparent rights are derived. However, as was demonstrated above, the objective of Portugal was to maintain its special visa regime with Brazil. In order to be able to do so, Portugal agreed to readmit Brazilian nationals who entered the territories of the other contracting parties through Portugal and were intercepted after the period referred to in Article 20(1) of the 1990 Convention (the above mentioned 90 days after the first entry in the Schengen territory). As can be seen, the text contains a clear readmission clause, however, unlike the classic readmission agreements where each country, based on the reciprocity principle, undertakes to readmit its own nationals; here is a unilateral act that carries no obligations for the parties benefiting from the readmission. At first sight this seems to place Portugal in a more disadvantaged position (relative to other Schengen states). However, as will become clearer below the obligations for Portugal were in reality quite narrowly limited.

(i) Conditions for setting the clause in motion

The Declaration foresees three conditions that need to be met in order for Portugal to readmit Brazilians onto its territory. They

(a) need to have entered the territories of the other contracting parties, via Portugal and under the Visa Waiver Agreement with Brazil;
(b) need to have been intercepted on the territories of the other contracting parties after the expiry of 90 days following the first date of entry as allowed under Schengen;
(c) need to meet the conditions of Article 5 of the 1990 Convention, namely the general conditions for granting access to the Schengen territory. These include: possession of a valid travel document, possession of a valid visa, if required, documents justifying the purpose, conditions and means of subsistence, and two negative conditions: not to be on the list of Schengen alerts and not to be considered a threat to public policy, national security or international relations.

Of all the conditions described above, the most questionable is the first one. It leaves the question of proof unanswered. It is not clear, for example, once a Brazilian is intercepted, how exactly it can be determined that s/he has entered the territory of another Schengen state via Portugal (unless we assume that the passport was stamped, something for which Portugal also took on an obligation in the second paragraph of the Declaration, but which it is not required to do under the Visa Waiver Agreement).

The situation becomes even more complicated after the entry into force of the Convention, which also puts into effect the provisions of the Declaration (1995). From that moment, Brazilian nationals who had initially been included on the 'grey' visa list would have the possibility to enter the Schengen area through Portugal, not on the basis of the bilateral treaty, but the Schengen Convention. With this, it is virtually impossible to determine whether the first condition of the readmission clause is met in any specific case. In reality, the provisions must be interpreted as a general obligation to accept all Brazilian nationals intercepted after the allowed 90 day period in a country other than that of their first entry (in this case Portugal), regardless of the exact grounds on which entry was allowed. Moreover, once the common visa system became operational, Brazilian nationals also had the possibility to enter without visas and directly onto the territories of the majority of the Schengen states which makes the special regime less relevant now.

Given the uncertainty surrounding this situation, it is interesting to see whether any additional acts were adopted in the Schengen framework clarifying the procedure and the means of proof for the application of the provisions of the Declaration. Up until the integration of the Schengen *acquis* into the Treaties, there is only one Decision of the Executive Committee,[24] dealing with the means of proof in the context of readmission agreements between Member States. No reference is made to the Portuguese case in the Decision, however; instead there is a reference to Article 23(4) of the Schengen Convention which regulates general readmission rules. Such a lack of procedural clarification can be explained in several ways. Firstly, it might be assumed that it was left to bilateral negotiations between Portugal and the states with a vested

[24] Decision of the Executive Committee of 15 December 1997 on the guiding principles for means of proof and indicative evidence within the framework of readmission agreements between Schengen States (SCH/Com-ex (97) 39 rev).

interest in the functioning of the provisions. However, considering the existence of Schengen as a multilateral platform of negotiations, it is difficult to see the logic of such a decision. Secondly, one can assume that the Declaration was included simply for political purposes and as no party has actually envisaged its implementation, no further rules have been adopted. This view can be supported by the general feeling of mistrust regarding the Declaration. The fact that such a Declaration is necessary at all shows that the initial Schengen states did not sufficiently trust Portugal in the implementation of the Schengen rules, especially in the case of Brazil. However, this interpretation of the Declaration is not compatible with the fact that it was integrated with the Schengen *acquis* into the Treaties. When the Schengen *acquis* was incorporated into the Treaties, many parts of the original Schengen *acquis* considered to have lost their significance (or were incorporated in other legal acts), were left out. So, if it had been of purely political importance, the Declaration would have been left out. However, this was not the case. Although all remaining Declarations of Part III of the Final Act were dropped,[25] the Declaration on Brazil was given a proper legal basis – Article 62(3) EC.[26] Thus, the conclusion can be reached that the intention in the drafting of the Declaration was more than political. This leads to the conclusion that the Declaration must be considered equal to a (unilateral) readmission obligation (rather than an agreement with obligations for all the countries involved).

This interpretation could explain both the lack of reference to Portugal in the Executive Committee decision on the means of proof in readmission cases, and the lack of any other implementing document, either bilateral or multilateral. Thus, the Declaration in Part III of the Final Act on Portuguese Accession to Schengen can be considered as a specific form of readmission agreement between Portugal and the other Schengen States.

(ii) Limitations

The above interpretation can also be supported by the lack of any limitation on the application of the Declaration clause. One would expect that if the major concern of

[25] For the full list, see Table 4.2 in Section 1.

[26] Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis , O.J. 1999, L 176/22, p.17.

the Schengen partners was the possible influx of Brazilian nationals to Schengen territory through Portugal, once the common visa list and common border check rules were in place, there would not be any need for additional guarantees on the side of Portugal. At that time, Brazilian nationals could enter the entire Schengen territory visa-free, not just Portugal. Apparently the need for this guarantee persisted, however, and the Declaration continues to be valid as it does not have any temporary limitations, or limitations linked to the adoption of a common visa list. Thus the provisions of the Declaration remained in force (as we have seen above), even when Portugal signed a new Agreement with Brazil in 1996 related to the issuing of visas,[27] which limited the allowed duration of stay with visa-free access to 90 days and introduced Schengen-compatible border checks, thus causing temporary problems in the bilateral relations with Brazil.

Such a development shows once again that the driving force behind the adoption and subsequent guarding of the Declaration was the irreconcilable difference between the will of Portugal to be faithful to its tradition of socio-economic links with Brazil and the fears of the other Schengen states. Whether those fears materialized and what the real impact was of the Declaration will be discussed below.

(iii) The numbers

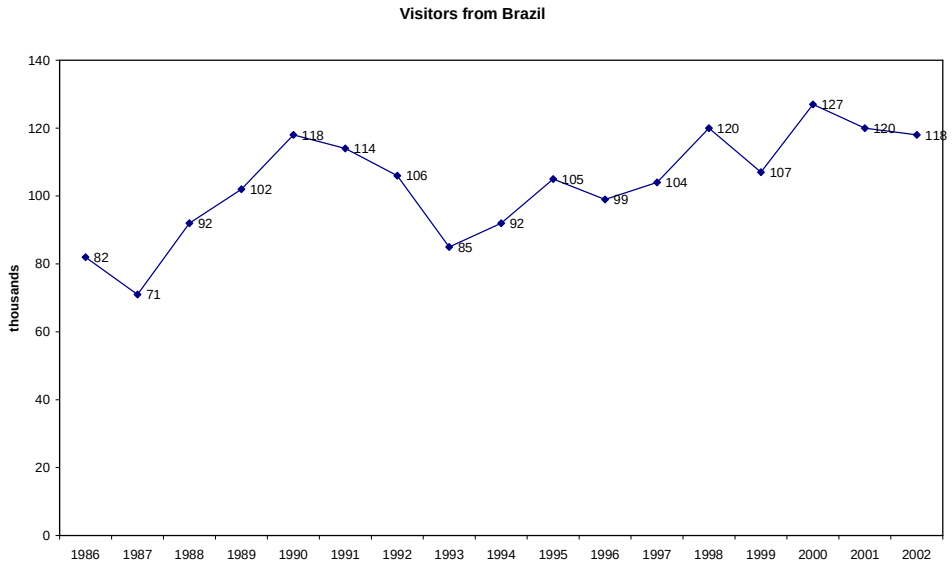
Four types of data should facilitate our analysis here. Firstly, the actual link between Brazil and Portugal will be evaluated through the number of Brazilian visitors to Portugal. Then the actual number of readmissions will be considered and finally, looking at the number of legally residing Brazilians and the regularization figures for Portugal and other Schengen states, the importance of the Brazilian illegal immigrants will be assessed.

Brazil is a huge country with a growing population of over 100 million and a low GDP per capita, (comparable to some of the new Member States from Eastern Europe). In the mid 1990s Brazil's GDP per capita was much lower (less than one half) than that of Portugal, which at the time was, together with Greece, the poorest

[27] Acordo Cooperação entre o Governo de República Federativa do Brasil e o Governo da República portuguesa relativo à isenção de vistos, celebrado em Brasília, a de 15 de Abril de 1996. [Cooperation Agreement between the Government of the Federative Republic of Brazil and the Government of the Portuguese Republic concerning the exemption of visas, signed in Brazil, 15 April 1996].

Member State. Brazil was thus then seen as a potentially large source of migrant workers. However, it seems that Brazil's geographical isolation from Europe puts certain economic barriers in the way of potential immigrants to Europe. The number of visitors from Brazil to Portugal has remained indeed constant over the years.[28]

Figure 4.1 Visitors from Brazil to Portugal, 1986-2002



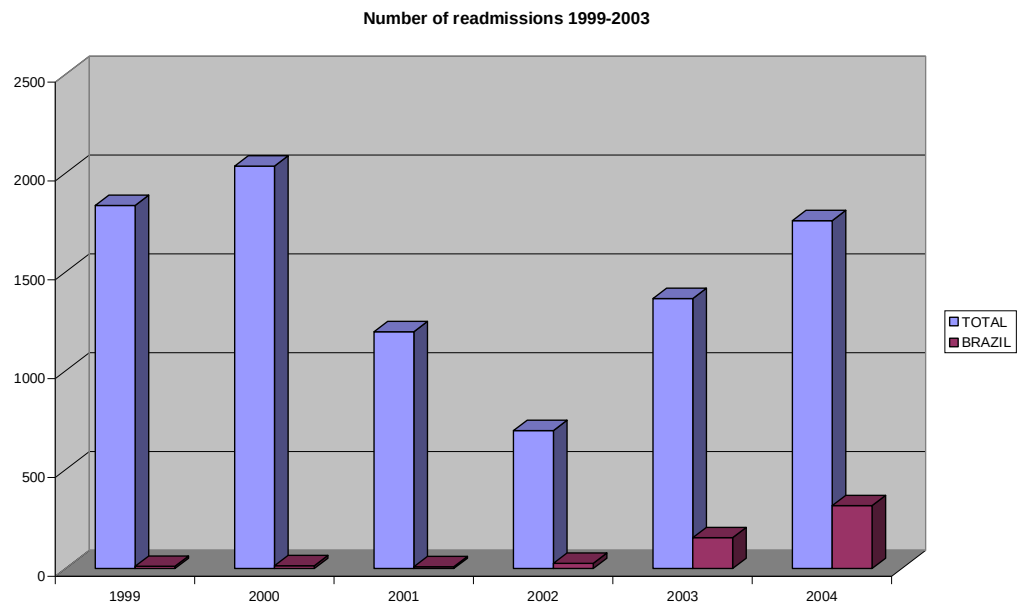
Source: Instituto Nacional de Estatistíca Portugal.

As can be seen, the entry into force of the Schengen Convention (1995) had almost no impact on the number of visitors. In the first years of application the numbers fell slightly, but in the following years they returned to normal levels. Moreover, if compared to the number of visitors from other countries, Brazilian figures are lower. Thanks to its military base on the Azores, the United States sends almost twice as many visitors to Portugal, for example.

If we look now at the readmission figures from the other Schengen states, it is obvious that they are negligible.

[28] More recently, Brazil seems to have a more dynamic economy and be catching up with Portugal, but this was difficult to foresee in the mid-1990s. The renewed dynamism of the Brazilian economy might also be one factor which lead to a reverse situation after 2004 enlargement of the EU when several of the new EU Member States found themselves facing visa requirements for Brazil. This lead to the negotiations of a EC-Brazil visa waiver agreement (see for further details Chapter 9).

Figure 4.2 Total number of readmissions by Portugal and the % of Brazilian nationals among them



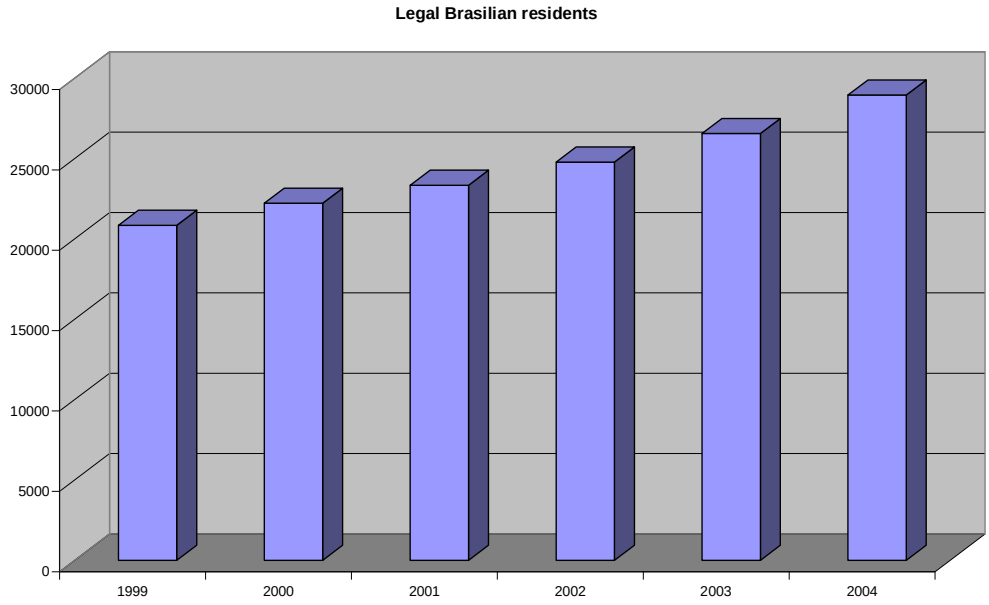
Source: Serviço de Extrangeiros e Fronteiras.

The two most significant countries returning third country nationals are France and Spain, and even there the numbers of Brazilians are sometimes lower than other nationalities (e.g. Eastern European). Thus the feared influx of Brazilians to the other Schengen countries through Portugal did not materialize. Although the fears were strongest in France[29] it has extremely low numbers of returned Brazilians. Of course, in order for a readmission to take effect, it is first necessary to intercept the illegal immigrants and therefore the readmission figures are not an absolute indication of the number of illegal immigrants from a certain nationality.

We therefore need to look at the regularization figures to find an indication of potential immigrant numbers. If we compare the regularization data for all Schengen states in the latest three regularization campaigns and the first five nationalities by number, it is clear that the only country with a significant Brazilian population is Portugal.

[29] France was the country that continued to require visas for Brazilian nationals until 1998, which put the country on the 'grey' visa list.

Figure 4.3. Legal Brazilian residents in Portugal



Source: Serviço de Extrangeiros e Fronteiras.

If we look at the data on regularizations[30] from the OECD, it can also be observed that the only country in which Brazilians formed a significant group of regularized migrants was Portugal. Neither France, nor Spain – the two main Schengen countries engaged in readmissions – had numbers indicating any significance of the Brazilian population on their territory.

[30] "Trends in International Migration: SOPEMI 2004 edition", *OECD*, (2005), p. 100.

Table 4.3. Immigrant regularization programmes in Portugal

(1992-1993)		**(1996)**		**(2001)**	
Angola		Angola	6.9	Ukraine	63.5
Guinea-Bissau	6.9	Cape Verde	5.0	Brazil	36.6
Cape Verde	6.8	Guinea-Bissau	4.0	Moldova	12.3
Brazil	5.3	Sao Tome and Principe	1.2	Romania	10.7
Sao Tome and Principe	1.4	Brazil	2.0	Cape Verde	8.3
Senegal	1.4			Angola	8.1
Other	4.8	Other	3.7	Other	39.8
Total	39.2	Total	21.8	Total	179.2

Source: OECD; part of Table I.19 Main regularization programmes of immigrants in an irregular situation in selected OECD countries, by nationality.

Moreover, even in Portugal, the Brazilians have recently been overtaken in number by Ukrainians.

2.5. Interim conclusions

This section has shown the flexible application of some Schengen rules in the case of Portugal. The preconditions of such an application are the following:

1. The bilateral visa-waiver agreement – based on close historical, economic and social ties between the two countries involved and in force at the time of accession to Schengen.
2. The specificity of the third country – since the country subject to this agreement has a large population but is geographically isolated from its counterpart; economic considerations can influence the number of persons benefiting from the special regime.
3. A lack of trust among Schengen partners – combined with the fear of a possible influx of immigrants due to the liberal provisions of the agreement.

Having all these conditions in place and aiming to maintain its special links with Brazil, Portugal made additional concessions. The flexible application of the Schengen rules was therefore only possible following agreement on the compensatory measures – in the form of a readmission obligation.

However, it seems that this readmission clause (a unilateral obligation), while legally binding, was needed mainly to reassure other Member States that they would not be swamped by immigrants from Brazil. In reality, despite the easy access to Portuguese territory, there was no surge in the numbers of Brazilian nationals entering other Schengen states, as was feared. Instead, it had only a limited impact on the territory of the Schengen states.

We can therefore conclude that in the case of bilateral visa waiver agreements, it is possible to maintain their application after accession to Schengen, when compensatory measures are offered to the other Schengen partners.

3. The case of Spain and Ceuta and Melilla

As discussed in the introduction to this chapter, there are only two countries[31] – Portugal and Spain, which have included in their agreements on accession to Schengen,[32] a special declaration meant to maintain an already existing bilateral regime, or to somehow integrate it into the newly established Schengen system.

3.1. The Declaration

In the case of Spain, the declaration in question deals with two Spanish enclaves[33] in Morocco – the towns of Ceuta and Melilla. The "Declaration on the Towns of Ceuta and Melilla" sets out the main elements and the practical construction through which the provisions will be applied. The starting point is the exception already granted to the two towns through the Protocol No 2 of the Act of Accession of Spain to the

[31] If we exclude the case of the ´land islands, which is not relevant for this study.

[32] Spain's agreement on accession to the Schengen Convention was signed on 25 June 1991.

[33] The two towns are usually referred to as enclaves, defined as "a portion of territory surrounded by a larger territory whose inhabitants are culturally or ethnically distinct". The cultural and ethnic distinctiveness of the towns in comparison to the surrounding territory can be questioned. Thus, the more precise term to be used would be the term "exclaves", defined as "a portion of territory of one state completely surrounded by territory of another or others". As can be seen, exclave refers to an objective distinction linked to state borders and division of territories, while enclave is linked rather to the subjective evaluation of the similarity or distinctiveness of the cultural and ethnic structure of the territory. Moreover, the very choice of the term used can have a political significance, as it can strengthen a view linked to the distinctiveness of a territory.

However, for the time being Ceuta and Melilla are referred to in the literature as enclaves, so this term will also be used here.

European Communities,[34] which provided for controls on the goods and travellers entering the customs territory of the European Economic Community from the two towns.[35] Based on the Declaration, Spain is allowed to maintain a special regime as regards the movement of persons between, on one side, the towns of Ceuta and Melilla and the surrounding Moroccan provinces and on the other between the two towns of Ceuta and Melilla and mainland Spain. The arrangement is based on the maintenance of two elements:

> (1) the specific arrangements for visa exemptions for local border traffic between Ceuta and Melilla and the Moroccan provinces of Tetuan and Nador continue to apply; and
> (2) Moroccan nationals who are not resident in the provinces of Tetuan or Nador and who wish to enter the territory of the towns of Ceuta and Melilla remain exclusively subject to visa requirements. The validity of these visas shall be limited to these two towns and may permit multiple entries and exits (visado limitado multiple) in accordance with the provisions of Article 10(3) and Article 11(1)(a) of the 1990 Convention.[36]

In order to ensure the interests of the other signatories to the 1990 Convention, there are two guarantees foreseen as far as border controls are concerned.[37]

First, Spain agreed to maintain checks (on identity and documents) on sea and air connections departing from Ceuta and Melilla and having as their destination any other place on the Spanish territory.[38] These checks are performed according to the national law and with the objective to verify whether the passengers satisfy the conditions laid down in Article 5 of the 1990 Convention, on the basis of which they

[34] For a recent legal analysis of the status of the two enclaves in the European Union, see BERRAMDANE, "Le statut des enclaves espagnoles de Ceuta et Melilla dans l'Union européenne", *Revue du Droit de l'Union Européenne*, 2/2008, (2008), p. 237.

[35] Paragraph (a) of Declaration 1 of Part III of the Final Act of the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement, The Schengen *acquis* - Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders signed at Schengen on 19 June 1990, to which the Italian Republic acceded by the Agreement signed at Paris on 27 November 1990, O.J. 2000, L 239, p. 69–75.

[36] Paragraphs (b) and (c), Declaration 1 of Part III of the Final Act of the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement, op. cit.

[37] Paragraph (d), Declaration 1 of Part III of the Final Act of the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement, op. cit., contains general statement for the considerations for the interests of the other contracting parties.

[38] Paragraph (e), Declaration 1 of Part III of the Final Act of the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement, op. cit.

were authorized to enter national territory upon passport control at the external border.

Secondly, apart from the travel directed to the Spanish territory, Spain undertakes to maintain checks on internal flights and on regular ferry connections departing from the towns of Ceuta and Melilla to a destination in another state party to the Convention.

Spain was thus allowed to maintain the special regime already in place between its enclaves and the surrounding Moroccan territory, while at the same time isolating the enclaves from the rest of the Schengen territory by maintaining border controls both on the traffic directed to Spain as well as that going to other Member States.

We shall now study in detail these special provisions by looking at the historical and geographic background that justified them, the way in which they have been implemented at national level, the way they interact with the respective European rules and, finally, we will draw some conclusions based on the practice of their implementation.

3.2. Geographic and historical background[39]

Despite the fact that, due to the special arrangements to which the two towns are subject, Ceuta and Melilla are often mentioned together, they are located more than 300 km apart on the Mediterranean coast of North Africa and border the territory of Morocco. The two towns also represent the only two remaining European territories in mainland Africa.

Ceuta is located on the southern coast of the Straits of Gibraltar, only 12 miles away from mainland Spain, and borders Morocco and its Tetuan province in particular. It has a territory of approximately 28 km² and population of about 75.000 (2005 est.). Due to its strategic location the town has a dynamic history but was ultimately included in the Spanish kingdom following the Treaty of Lisbon of 1 January 1668,

[39] For a comprehensive study of the two enclaves in English, see P. GOLD, *Europe or Africa? A contemporary study of the Spanish North African Enclaves of Ceuta and Melilla*, Liverpool University Press, (Liverpool, 2000).

through which the Portuguese King Afonso VI formally ceded Ceuta to King Carlos II of Spain.

Administratively, until 1995 Ceuta belonged to the autonomous region of Andalucia and more precisely to the Cadiz province. Following a reform in 1995, Ceuta, together with Melilla, are the only two autonomous cities in Spain. Following the accession of Spain to the European Union, Ceuta is considered part of the territory of the European Union; however it is subject to special rules as far as customs are concerned.

Melilla is also located on the North African Mediterranean coast around 300 km east of Ceuta and borders the Moroccan province of Nador. It has a territory of 20 km² and a population of about 65.000 (2005 est.). It was conquered by Spain in 1497 and the limits of the Spanish territory around the fortress were fixed by Treaties with Morocco in 1859, 1860, 1861 and 1894. These treaties were result of several wars fought over the shrinking Spanish presence in Morocco.

Until 1995, Melilla was administratively part of the autonomous region of Andalucia and more precisely of the province of Malaga. Like Ceuta, since 1995 Melilla is an autonomous city and also forms part of the territory of the European Union, while keeping certain special rules in place, especially as far as the customs rules are concerned. Thanks to the special rules on border traffic, about 36,000 Moroccans enter the city daily to work, shop or sell goods.

After Spain joined the European Union in 1986, the territorial dispute regarding the status of Ceuta and Melilla persisted and was repeatedly discussed on a bilateral level between Spain and Morocco.[40] Meanwhile, the borders between the enclaves and Morocco became of EU concern and their management acquired an EU dimension.

[40] For the dynamics of the relationship see for example: GONZÁLEZ CAMPOS, "Las pretensions de Marruecos sobre los territorios españoles en el Norte de África (1956-2002)", *Real Instituto Elcano*, DT No 15/2004, 16 April 2004, [The claims of Morocco on the Spanish territories in North Africa (1956-2002], and TORREJÓN RODRÍGUEZ, "Las Relationes entre España y Marruecos según sus tratados internacionales", *Revista Electrónica de Estudios Internacionales*, 11, (2006), [The relations between Spain and Morocco according to their international treaties].

After Spain joined the Schengen Agreement in 1991, tight border controls were soon implemented. Visa requirements were imposed on Moroccan citizens in 1991 and this had a remarkable impact on Spanish-Moroccan border dynamics.[41] The control mechanisms were reinforced and the patterns of cross-border mobility were significantly altered. From that moment onwards, Moroccan citizens were not allowed to cross the new Spanish (now Schengen) border with Morocco without a visa.

Considering that both enclaves are absolutely dependent on cross-border interaction with the surrounding Moroccan territory, the special regime acquired by Spain through its declaration allowed the cross-border flow of 'desirable migrants' to continue.

However, Ceuta and Melilla continued to attract many would-be immigrants to the EU and thus their land perimeters were readjusted to respond to this potential threat. Ceuta and Melilla and the borders of their territory represent external borders of the European Union[42] but the manner in which they are guarded resemble the époque of the Iron Curtain. The construction of barbed-wire border fences erected in Ceuta in 1993 and Melilla in 1996 marked the first steps towards a stricter control of the whole Spanish southern border. The external border of Ceuta (7.8 km of double border fence, divided into three sectors)[43] is guarded by policemen and officers of the Guardia Civil. The external land border at Melilla is characterized by a double border fence of approximately 10.5 km divided into three sections. The outer fence has a height of 3.5m; the inner fence reaches 6m in some places. Both fences are equipped with barbed-wire to prevent illegal immigrants from climbing the fence. Both fences are equipped with cameras for video surveillance and infra-red surveillance. This militarization of the border was coupled with legal measures such as the 1992

[41] FERRER, DE WITTE, KRAMSCH, BOEDELTJE, AND VAN HOUTUM, "Spanish-Moroccan Border: Regional Profile", *Nijmegen Centre for Border Research*, (Nijmegen, 2009).

[42] See the list of land border crossing points of Spain, attached to the Common Manual and the Common Consular Instruction.

[43] The information about the border fences comes from the report of the Commission's technical mission to Morocco. "Visit to Ceuta and Melilla – Mission Report. Technical Mission to Morocco on illegal immigration", MEMO/05/380, Brussels, 19 October 2005.

readmission agreement between Spain and Morocco targeting migrants who entered Spain 'illegally' without a permit.[44]

Such a situation created difficulties (or at least inconsistencies) for the implementation of Spanish migration policy, as on the one hand the continuation of the special regime of Ceuta and Melilla was important for economic, political and social reasons, and on the other hand, the very same border had to be tightened and even militarized in order to prevent illegal immigration.

The strategic location of these enclaves in the North of Morocco at the crossroads of Africa and Europe triggered immigration flows from both the Maghreb countries and Sub-Saharan Africa. A situation escalated in September and October 2005, when the enclaves witnessed large-scale and coordinated attempts by African immigrants to cross the border by forcing their way through the barbed-wire fences.[45] In the whole of 2005, around 11,000 attempted illegal border crossings were registered at this border line.[46]

3.3. Legal provisions in national legislation

According to Article 149(1) of the Spanish constitution, the central government has exclusive competence in the field of immigration, emigration and the issues linked to the status of foreigners. Thus, the rules on entry and the conditions for admission form part of the Aliens Act 4/2000.[47]

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[44] Presidencia del Gobierno, "Marruecos accepta la readmission inmediata de los inmigrantes que entren ilegalmente en Ceuta and Melilla", *Notas de prensa de Presidencia del Gobierno*, 6 October 2005, [Morocco accepts the immediate readmission of illegal immigrants entering Ceuta and Melilla].

[45] According to the Spanish and Moroccan authorities, five immigrants died on 29 September 2005 at the border of Ceuta when some 700 migrants stormed the fence and 6 died on the border of Melilla on 6 October 2005 when some 400 stormed the fence there.

[46] For comparison, the annual attempted illegal border crossings on the longest pre-2004 enlargement land border between Finland and Russia is around 40, based on data by the Finnish border guard.

[47] Ley organica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su intergacion social, en su redaccion dada por las leyes organicas 8/2000, de 22 deciembre, de 29 de septiembre, y 14/2003, de 20 de noviembre, available on the website of the Ministry of Labour and Social Affairs : http://extranjeros.mtas.es/. Law 4 / 2000 of January 11 on the rights and freedoms of foreigners in Spain and their social integration, as amended by Organic Laws 8 / 2000 of Dec. 22, from September 29 and 14/2003 of November 20.

Article 25 of this act deals with the requirements for entry onto Spanish territory and is further developed by Article 1 of the Regulation[48] implementing the Aliens Act of 2000:

> 1. Aliens wishing to enter Spanish territory must, without prejudice of the terms of international treaties subscribed by Spain, do so through posts authorized for the purposes, and must hold an identifying passport or travel document considered valid for the purposes according to international treaties subscribed by Spain, they must hold a valid visa when required, and not be subject to express prohibitions. They must also present the documents indicated in these Regulations which justify the purpose and conditions of stay, and evidence sufficient living resources for the time they wish to remain in Spain, or that they are in a position to secure such resources, pursuant to the terms of these Regulations.
> 2. Exceptionally, the authorities or officers responsible for border control may authorize border-crossings at other than authorized points or on the days and at the times set, to persons in the following circumstances:
> a) Those granted authorization to cross the border as a consequence of a specific need.
> b) Beneficiaries under bilateral agreements to the effect with bordering countries.

Thus, the special rules referred in the Schengen Declaration do not indeed figure directly in the Spanish secondary legislation dealing with the entry onto Spanish territory, but refer further to "*bilateral agreements to that effect with bordering countries*".

There are three groups of third country nationals, in particular Moroccan citizens, who could claim special treatment as far as Ceuta and Melilla are concerned. The first group, those with the most limited rights, includes Moroccan citizens who are not resident in the provinces of Tetuan and Nador. In order to visit the two enclaves, a member of this group has to apply for a visa but will have the possibility to receive a multi-entry one, allowing repeated access to the territory. The second group of Moroccan nationals includes residents of the two provinces of Nador and Tetuan. They are allowed visa-free access to the two towns based on their Moroccan residence cards. However, their access is limited in time. The third group includes those Moroccan citizens actually residing in Ceuta and Melilla with a document called "tarjeta de estadistica". A Constitutional Court case of 1994 actually deals with the

[48] Royal Decree No 864/2001, of 20 July, passing the Regulations enabling Organic act No 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration, reformed in organic act No 8/2000 of 22 December.

equality concept in the context of the special residence permits issued to non-European residents of Ceuta and Melilla.[49]

3.4. Mechanism of application in the EU

Spain has always been very consistent in its insistence on maintaining the regime agreed when it joined Schengen. Despite the numerous transformations through which the visa policy went itself – from its communitarization, through to the integration of Schengen into the treaties and to the second generation legislation in this field (being developed now), there was always a reference to the special rules applicable to Ceuta and Melilla.

Contrary to the Portuguese case discussed earlier, the Council decided that a legal basis did not need to be determined in conformity with the relevant provisions of the Treaties for the Declaration of Spain on the towns of Ceuta and Melilla.[50] However, this did not prevent the inclusion of references to Ceuta and Melilla in future acts related to border controls.

A special article on the Schengen Borders Code[51] is also dedicated to Ceuta and Melilla. According to Article 36 of the Schengen Borders Code, its provisions should not affect the special rules applying to the cities of Ceuta and Melilla, as defined in the "Declaration by the Kingdom of Spain on the cities of Ceuta and Melilla in the Final Act to the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement" of 14 June 1985.

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[49] See Spanish Constitutional Court Judgment, STC 150/1994, of 23 May 1994 (equality in the right to work of Moroccans from Ceuta, holders of "tarjeta de estacística" (statistical card).

This case deals with the right of employment of the Moroccans residing legally in the two enclaves and not about their right or conditions of entry; therefore it will not be discussed further. For an analysis of the case in the context of constitutional rights of foreigners in Spain see, MAGDALENA NOGUEIRA GUASTAVINO, "Los derechos sociales fundamentals de los extranjeros: las SSTC 236/2007 y 259/2007 como reconstruccion de una doctrina constitucional confusa", Universidad Autonoma de Madrid, at: http://portal.uam.es/portal/page/profesor/epd2_profesores/prof1619/publicaciones/Iustelextranjeros.pdf

[50] Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis***,** O.J. 1999, L 176, p. 17–30.

[51] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2006, L 105, p. 1–32.

Identical wording is used also in Article 16 of the Local Border Traffic Regulation, also adopted in 2006.[52]

3.5. Interim conclusions

When Spain joined Schengen it wanted to keep its two enclaves in Morocco open to people for local movement. However, as Morocco is an important source of migrants to a number of Schengen states it is natural that Spain's Schengen partners insisted on measures that would limit the possibility of Moroccan citizens to reach the Schengen territory. The solution was simple: to maintain checks on persons travelling between these two enclaves and mainland Spain.

4. Conclusions

This chapter studied the legal acts through which the expansion of the Schengen area took place during the 1990s. It concentrated on two specific cases in which the acceding states wished to maintain special links with third countries. In the case of both Portugal and Spain, this wish to keep the freedom of movement for citizens of third countries (Brazil and Morocco, both sources of migrants) clashed with the fears of the other Schengen states that it would lead to widespread (potentially illegal) immigration. The solutions to the conundrum were quite different in each case: Portugal had to accept a unilateral readmission obligation, in effect. In the case of Spain, the problem could be isolated geographically and all Spain had to do was to maintain checks on the movement of persons between the outlying Spanish territory on the North African coast and mainland Spain. In the end, it proved possible in both cases to accommodate the special concerns of the acceding states while taking care of the concerns of the other members of the Schengen area.

[52] Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (O.J. 2006, L 405).

CHAPTER 5 – THE SUPRANATIONAL LIFE OF VISAS

This chapter analyzes the legal basis for visa policy in the Treaties. Section 1 starts with a brief description of how visas appeared for the first time in the Maastricht Treaty, and then goes on to detail the more complete provisions in the Amsterdam Treaty. Sections 2 and 3 then provide an analysis of the differentiation in the field under Amsterdam between the Schengen area, the willing outsiders (Norway, Iceland and later Switzerland) and the reluctant insiders (Denmark, Ireland and the UK). Section 4 deals with legal and institutional developments post Amsterdam (Vienna Plan, Tampere and Hague programmes). Section 5 concludes.

1. The Maastricht Treaty

Visa policy made its debut in the European Treaties within the Treaty of Maastricht and an agreement to disagree:

> The negotiators of the Treaty on the European Union compromised on the issue of whether the European Community was competent to address issues relating to visas and border controls, and did not settle the question of whether Article 8a EEC (which was renumbered Article 7a EC by the Maastricht Treaty) required the abolition of border checks on all persons.[1]

The provisions on visas were split between the newly created first and third pillar. In the first pillar, a new Article 100c EC was inserted which dealt explicitly with the procedure for determining the "*third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States*" and with the adoption of "*measures relating to a uniform format for visas*". The provisions potentially relating to visas included parts of Article K.1 EU, and more precisely "*rules governing the crossing by persons of the external borders of the Member States and the exercise of control thereon*" and "*conditions of entry and movement by nationals of third countries on the territory of Member States*". These two aspects of visa policy in the Maastricht Treaty will be studied in detail below.

[1] S. PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford Law Library (Oxford, 2006), p. 98.

Hailbronner, who looked in some depth at the development of the visa competence of the Community, concluded that the division between the first and third pillars "*underlines the intention of the Member States to transfer only a limited part of their sovereign rights. On the other hand, the Community's powers must be interpreted in such a way as to enable the Community to discharge its legislative tasks and functions in a rational and effective way*."[2]

1.1. Article 100c EC

Article 100c EC conferred on the Community two powers: to adopt "a list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States" and to adopt "measures relating to a uniform format for visas".

> Article 100c.
> 1. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.
> 2. However, in the event of an emergency situation in a third country posing a threat of a sudden inflow of nationals from that country into the Community, the Council, acting by a qualified majority on a recommendation from the Commission, may introduce, for a period not exceeding six months, a visa requirement for nationals from the country in question. The visa requirement established under this paragraph may be extended in accordance with the procedure referred to in paragraph 1.
> 3. From 1 January 1996, the Council shall act by a qualified majority on the decisions referred to in paragraph 1. The Council shall, before that date, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, adopt measures relating to a uniform format for visas.
> 4. In the matters referred to in this Article, the Commission shall examine any request made by a Member State that it submit a proposal to the Council.
> 5. This Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security.
> 6. This Article shall apply to other matters if so decided pursuant to Article K.9 of the provisions of the Treaty on European Union which relate to cooperation in the fields of justice and home affairs, subject to the voting conditions determined at the same time.
> 7. The provisions of the conventions in force between the Member States governing matters covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant to this Article.

[2] HAILBRONNER, "Visa Regulations and Third Country Nationals in EC Law", *Common Market Law Review*, n. 31, (1994), pp 969-995.

The right of initiative belonged to the Commission; with an obligation to "*examine any request made by a Member State*" asking it to submit a proposal to the Council. In the case of the visa list power, the Council was to act unanimously until 1 January 1996 and with qualified majority thereafter. In the case of visa formats, the Council was to decide with qualified majority from the outset. The procedure also envisaged consultation with the European Parliament. The Court of Justice had its normal jurisdiction in the Community pillar.

The Article also included several limitations. According to Article 100c (2) in cases of

> an emergency situation in a third country posing a threat of a sudden inflow of nationals of that country into the Community, the Council, acting by a qualified majority on a proposal from the Commission, may introduce, for a period not exceeding six months, visa requirements for nationals for the country in question.

The extension of visa requirements established under this procedure, however, was possible only following a unanimous decision of the Council.[3]

The second limitation relates to the fact that "*this Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*."

Lastly, the parallel existence of the Schengen rules was confirmed by stating that "*the provisions of the conventions in force between the Member States governing areas covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant to this Article*."

Despite the view of some authors that Article 100c TEU has communitarized the visa policy of the Member States,[4] the communitarization, as will be demonstrated below, covers only two, albeit important aspects of the visa policy, namely the uniform format for visas and the visa black list. The issue of the exact scope of the Community competence under Article 100c was later subject to a case at the ECJ.

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[3] This power was never used according to Peers, op. cit., p. 98.

[4] D'OLIVEIRA AND ULRICH, "Expanding external and shrinking internal borders: Europe's defence mechanisms in the area of free movement, immigration and asylum", in O'KEEFFE AND TWOMEY, *Legal Issues of the Maastricht Treaty*, Wiley Chancery Law, (London, 1994).

Using the powers of Article 100c EC, the Council adopted a visa format Regulation and a visa list Regulation in 1995. The first was rather unproblematic. The Visa Format Regulation[5] provided that short-term visas (for a stay of up to three months) and transit visas issued by the Member States were to be produced in the uniform format provided in the Regulation, and were to comply with a number of specifications to be adopted by the Commission assisted by the Committee of representatives of the Member States.[6] The Regulation authorized the Member States to also use the uniform format for visas falling outside its scope (i.e. national visas), provided differences were incorporated in order to distinguish them from those within the scope of the Regulation.[7]

The exercise of the second power related to the visa lists had a much more difficult life and will be studied in detail below.

1.1.1. 1995 Visa Regulation

Six weeks after the entry into force of the Maastricht Treaty, the Commission made a Communication to the Council and to the European Parliament concerning (i) a Proposal for a decision, based on Article K.3 of the Treaty on European Union, establishing a convention on the crossing of the external frontiers of the Member States, and (ii) a Proposal for a regulation, based on Article 100c of the EC Treaty determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States[8] (the so-called visa list).

The exact scope of the Community competence under Article 100c was subject to numerous inter-institutional conflicts and the only undisputed element of it was the competence for drawing up the first Community-wide black visa list.

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[5] Council Regulation No 1683/95, O.J. 1995, L 164/1.

[6] Article 1 and 5 of Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas, O.J. 1995, L 164, p. 1–4 (hereafter Visa Format Regulation)

[7] Article 7 of the Visa Format Regulation

[8] Proposal for a regulation, based on Article 100C of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, COM(93) 684 final, O.J. 1994, C 11, p. 15.

The Commission's proposal was based on its interpretation of the position of Article 100c in the Community structure and its link with Article 7a EC. The Commission's understanding of the division of competence for visa policy between the first and third pillars, as illustrated by the Commission's proposals, was ultimately underpinned by the Commission's interpretation of Article 7a.[9] Based on this belief, the Commission included in the draft Regulation not only rules about the visa black list, but also about the visa white list and the principle of mutual recognition of visas among the Member States.

According to the Commission, as the provision of Article 100c was placed amongst the internal market provisions of the Treaty it is thus designed to contribute towards achieving the free movement of persons within the Internal Market, as specified in Article 7a EC.[10] The Commission considers the purpose of Article 100c to be the harmonization of the regulations and practices of the Member States.[11] From that it follows that in order to achieve full harmonization, it is not sufficient to harmonize only the black list but also the white list. Therefore the proposed regulation does not only contain a list of 126 countries whose nationals had to be in possession of a visa when crossing the external borders, but also an obligation for the Member States to include all countries in either the black or the white list by a set deadline (30 June 1996). If this requirement was met, a full harmonization of visa requirements among the Member States would result.

In addition, the proposal considered the mutual recognition by Member States of visas issued by the other, as "*an essential accompanying measure for the achievement of the objective set out in Article 7a as regards free movement of persons*"[12] and a cornerstone of the proposal.[13] Article 2 of the Draft Regulation reads "*a Member State should not be entitled to require a visa of a person who seeks to cross its external*

[9] HAILBRONNER, op. cit.; and D. O'KEEFFE, "The New Draft External Frontiers Convention and the Draft Visa Regulation", in MONAR AND MORGAN, *The Third Pillar of the European Union: Cooperation in the fields of justice and home affairs*, College of Europe (Bruges, 1994).

[10] See the Explanatory Memorandum to the Commission's Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 0027 final, O.J. 2000, C 177E, p. 66–69.

[11] Preamble of the Commission Proposal for a Regulation, COM (2000) 0027 final, op. cit.

[12] Preamble of the Commission Proposal for a Regulation, COM (2000) 0027 final, op. cit.

[13] See Explanatory memorandum, op. cit.

frontiers and who holds a visa issued by another Member State, where that visa is valid throughout the Community".

The view of the Parliament with regards to the scope of Article 100c was even wider than that of the Commission. The Parliament considered that the Draft regulation should also cover the common conditions and procedures for the issuing of visas and the principle of equivalence between a residence permit and a visa (which formed part of the proposed Draft Convention).[14]

The interpretations put forward by the Commission and the Parliament were ignored by the Council. The final text of the Regulation was stripped down to the strict text of Article 100c, namely the harmonization of the visa black list. The obligation for harmonization of the white list and the principle of mutual recognition of visas were excluded. To avoid further activism on the side of the Commission, the Council expressed its view in the preamble of the Regulation, that: "*the Member States will constantly endeavour to harmonize their visa policies with regard to third countries on the common list*" but the principle of mutual recognition and the conditions and criteria for issuing visas were matters to be determined within the "*appropriate framework*", namely the third pillar.[15]

As a result of the inter-institutional disagreements, the final scope of the Regulation was limited to determining the third countries whose nationals shall be required to be in possession of a visa when crossing the external frontiers of the Member States. However, even this exercise proved problematic. The main discussion points were linked to the composition of the list and the criteria for placing a particular country on it.

[14] PEERS, "The Visa Regulation: Free Movement Blocked Indefinitely", *European Law Journal*, n. 21, (1996), p. 150.

[15] Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O.J. 1999, L 72, p. 2–5.

1.1.2. Composition

The black list included 126 countries or territories in an annex to the Draft Regulation. The black list proposed by the Commission was based on the Schengen black list and the Commission's objective was to have the shortest possible grey list of countries for which national discretion remained. For a third country national from the grey list there was the possibility to enter a Member State that did not require a visa and then travel to a Member State that did. In composing the list, the Commission had not negotiated with the three EU non-Schengen member countries (Denmark, Ireland and the United Kingdom), nor with the non-EU Schengen countries, but considered that the composition of the list was to be the main negotiating point in the Council. The Commission supported the view that:

> to the extent that imposition of a visa requirement by all twelve Member States might be seen as an unfriendly gesture, this would be balanced by the advantage to be gained in that access to all the Member States would require only a single uniform visa, instead of ten separate visas.[16]

The composition of the black list presented a particular problem to some of the Member States, especially the non-Schengen members. In the case of the United Kingdom for example, if it had adhered to the list in the form in which it was originally proposed it would have had to impose visas requirements on 45 countries, previously visa-exempt (the number of countries on the UK visa list at the time was 81). An additional concern on the side of the UK was the direct effect the Regulation would have in a field that was previously subject to a national Parliamentary resolution. The Home Office explained the reasons for these disparities in visa practice between the Member States as follows:

> The United Kingdom relied heavily on control at frontiers by immigration officers and assessed the need for a visa requirement in terms of immigration and security risk. There were real differences in the immigration and security threat that particular countries were seen to present to different Member States. Some Member States were more ready to impose visas to express political disapproval, while others attached importance to reciprocity.[17]

[16] House of Lords Select Committee on the European Communities (1993-1994), "Visas and Control of External Borders of the Member States", 14th Report, para 73.

[17] Ibid., para 71.

The United Kingdom strongly opposed the adoption of the black list, claiming that the inclusion of the Commonwealth countries on this list was not justified, either on security or on immigration risk grounds. In particular it argued that any immigration flow from these countries would be directed primarily to its territory rather than that of the other Member States.[18] The final list thus excluded twenty-eight countries, almost all Commonwealth countries – though nationals of these countries remained subject to visa requirements within the Schengen framework.[19]

1.1.3. Criteria

Part of the criticism directed towards the Commission was its failure to set out clear criteria for inclusion on the black list. There is no reference to the criteria used for the composition of the list and the only reference to them is to be found in the preamble of the Draft Regulation. Two criteria are identified: (1) the political and economic situation in the third countries and (2) their relationship with the Community and the Member States. The House of Lords Select Committee on the European Communities was more successful in developing the criteria as a result of its enquiry. The Committee shared the view that the list of countries whose nationals would require visas to enter the territory of the Member States was unnecessarily long. The Committee identified four reasons for the imposition of visa requirements:

The first was a threat of an unacceptable level of immigration from that State.

The second was a risk to internal security from nationals of that State.

The third was political – visa restrictions are to be imposed as a matter of reprisal or in the context of deteriorating bilateral relations.

The fourth was reciprocity, if the partner country itself imposes visa restrictions.[20]

The criteria applied by the Schengen states were unknown to the Committee but it is obvious that the final black list represented a lower number of countries than would end up on the list, if a simple accumulation of the national black lists had been applied. The Committee recommended that the twelve Member States should attempt

[18] A. MELONI, *Visa Policy within the European Union Structure*, Springer, (Berlin, 2005), p. 79.

[19] Art. 6 of the 1999 Visa Regulation, op. cit.

[20] House of Lords Select Committee on the European Communities (1993-1994), "Visas and Control of External Borders of the Member States", 14th Report, para 106-108.

to formulate coherent criteria common to all before constructing their list, with a view to keeping it as short as possible.
Ultimately, all countries and territories in the world fall into one of four groups:

(1) countries whose nationals were not required to have a visa in any of the Member States of the EU;
(2) countries, whose nationals needed a visa to enter all countries of the EU e.g. Libya and Iraq
(3) countries whose nationals require visas only to enter certain Member States – e.g. Australia;
(4) countries on the Schengen black list but not on the EU list – 28 in total.[21]

Despite the fact that the Council made substantial changes to the text proposed by the Commission and the Parliament, it did not consult the Parliament again before adopting the Regulation. Thus, the Parliament brought proceedings against the Council under Article 173 (now 230) for failure to consult. The Court of Justice annulled the Regulation on this procedural ground while preserving its effects until a replacement was adopted.[22] The only question before the Court was whether the text as adopted differed in essence from the text on which the Parliament had been consulted. This is because the Parliament's attack was limited to the protection of its prerogatives. The Court noted that the Council's adopted text allowed the Member States to maintain, for an indefinite period, their list of third countries not on the common list whose nationals were subject to visa requirements. For this reason the Court maintained that "*those amendments go to the heart of the arrangements established and must therefore be described as substantial.*" On this ground alone, the Court held that it was necessary to anul the Regulation and that other arguments put forward by the Parliament need not be considered.

The Council adopted the replacement of the Regulation two years later, in 1999, after consulting the Parliament and ignoring its proposed amendments.[23]

[21] B. MELIS, *Negotiating Europe's Immigration Frontiers*, Kluwer Law International, (The Hague, 2001).
[22] Case 392/95 *Parliament* v. *Council* [1997] ECR I-3213.
[23] Council Regulation 574/1999, op. cit.

Thus, while the Commission proposal was submitted in December 1993, the final text, following the judgment of the ECJ, was adopted by the Council only on 12 March 1999, and only two months before the entry into force of the Amsterdam Treaty. That Treaty resolved all the issues which had proved to be so divisive in the field of visas under the Maastricht Treaty.

There was one more case before the Court of Justice in this period, this time related to the dividing line between the EC's first pillar visa powers and the EU's third pillar visa powers. The dispute centred upon airport transit visas. Initially, they were included in the Commission proposal for a Visa Regulation but the Council deleted these provisions and instead adopted a third pillar Joint Action under Article K.3 EU, with a limited list of ten non-EU states whose nationals would need airport transit visas even to pass through an airport transit lounge of a Member State.[24] The objective of the harmonization was security and the control of illegal immigration. The Joint Action stipulated that for countries not on the list, the Member States retained discretion as to whether or not to require airport transit visas. It did not provide for the conditions governing the issuing of airport transit visas but envisaged the possibility of criteria being adopted by the Council in the future.

The adoption of the Joint Action was challenged by the Commission through an action for annulment[25] in which it argued that measures on airport transit visas fell under the scope of Article 100c EC, thus linking harmonization in this field to the establishment of the internal market. The Council maintained that the measure was outside the scope of Article 100c EC, since in the case of airport transit no "crossing of the external borders" of the Member States was taking place, as the third country nationals would not be legally entering the territory of the Member States.

The Court ruled that persons in an airport transit zone had not yet crossed the legal (as distinct from the physical) external borders of the Member States. The Court linked its

[24] 96/197/JHA: Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements, O.J. 1996, L 63/8.
[25] Case C-170/96 *Commission* v. *Council* [1998] ECR I-2763.

interpretation of Article 100c EC to Article 3(d) EC[26] and concluded that since persons within the airport transit zones could not be considered as participating in the 'internal market', they had not crossed an external border for the purposes of Article 100c.

2. The Amsterdam Treaty

The Treaty of Amsterdam entered into force in May 1999[27] and brought about a further communitarization of visa policy.

A special Title IV of the EC Treaty addressed issues of visas, asylum, immigration and other policies related to free movement of persons. Article 61 (1) holds that:

> in order to establish progressively an area of freedom, security and justice, the Council shall adopt within a period of five years after the entry into force of the Treaty of Amsterdam [1 May 2004], measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62 (2) and (3) and Article 63(1) (a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union.

The means of accomplishing this objective in the field of visas, which are designated as "flanking measures", are outlined in Article 62 (2) EC and form part of the measures on the crossing of the external borders of the Member States. They include:

> (i) rules on visas for intended stays of no more than three months, including:
> (ii) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
> (iii) the procedures and conditions for issuing visas by the Member States;
> (iv) a uniform format for visas;
> (v) rules on a uniform visa.

[26] This article listed the activities of the Community and specified that those activities included "measures concerning the entry and movement of persons in the internal market as provided for in Article 100c EC".

[27] The Treaty was agreed in June 1997 and signed on 2 October 1997.

Peers noted that the structure of these provisions closely followed the structure of Article 1-25 of the Schengen Convention and closely paralleled EC or EU measures that have previously been proposed or adopted.[28]

As far as decision-making is concerned, Article 67 EC provides for a two-stage system. Up until 1 May 2004, the EC visa powers were subject to unanimous voting in the Council, consultation of the EP, and a shared initiative of the Commission and the Member States. An exception to this rule were the powers concerning visa lists and visa formats, which were subject to qualified majority voting in the Council, consultation of the Parliament and the sole initiative of the Commission immediately upon the entry into force of the Treaty of Amsterdam.

As from 1 May 2004, the Commission gained the sole right of initiative on all visa matters, and a set of powers related to the visa conditions, procedures and rules automatically became subject to qualified majority voting in the Council and co-decision with the European Parliament.

As far as implementing measures are concerned, in 2001 the Council adopted two regulations with which it reserved for itself (and in some instances for the individual Member States) the power to adopt measures amending the Common Consular Instructions for visa applications[29] and the Common Manual concerning external borders.[30] The Commission challenged the regulations in an action for annulment and lost the case.[31] The Court upheld the Council's decision because, inter alia, in 2001 the issues had until recently been dealt with pursuant to the third pillar, the transitional period for Title IV decision-making was still in force in 2001, the subject matter being delegated was clearly circumscribed, and the Council had committed

[28] S. PEERS, op. cit., p. 101.

[29] Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications, OJ L 116, 26.4.2001, p. 2–4

[30] Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance, OJ L 116, 26.4.2001, p. 5–6

[31] Case C-257/01 *Commission v Council* [2005] ECR I-345,

itself to reviewing the delegation to itself by 2004.[32] As to the latter argument, the planned review took place only in 2006 in the case of borders[33] and in 2009 in the case of visas,[34] when the Council conferred implementing powers in these two fields to the Commission.

Title IV EC included a new procedure for a ruling on a question of interpretation of its provisions and the acts based upon it.[35] In this case, the Council, the Commission, or a Member State (but not the European Parliament) can initiate the procedure. However, such rulings did not apply to judgments Member State courts or tribunals, which had become *res judicata*.

The normal preliminary ruling procedure also applies to requests coming from national courts of last resort. The request can involve the interpretation of Title IV and the interpretation and validity of measures adopted under it.[36] There has already been a case when the ECJ held that it lacked jurisdiction under Article 68(1) EC to interpret the Visa Regulation on a preliminary ruling from a national court that was not a Court of last resort.[37]

The provisions related to national safeguards and emergency situations, which formed part of the old Article 100c EC transferred to the Amsterdam Treaty. Article 64(1) EC provides that Title IV "*shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*". Article 64(2) EC provides for emergency situations and has already been invoked on numerous occasions.[38] If one or more

[32] Some authors criticize this approach, in particular since: "the novelty of the subject matter has never before been grounds for disapplying the normal rules on implementing measures; Article 67 EC makes no exception to the normal 'comitology rules'; the subject-matter was not clearly circumscribed, but very broad; and the Treaty simply does not provide for implementing powers to be conferred upon Member States." See S. PEERS "The EU Institutions and Title IV", in S. PEERS AND N. ROGERS (eds.), EU Immigration and Asylum Law: Text and Commentary (Martinus Nijhoff, 2006)

[33] With the adoption of the Schengen Borders Code, discussed in section 4.2 of this chapter.

[34] With the adoption of the Visa Code, discussed in section 4.2 of this chapter.

[35] Article 68(3) EC.

[36] Article 68(1) EC.

[37] Case C-51/03 *Georgescu* [2004] ECR 1-3203.

[38] For details, see APAP AND CARRERA, "Maintaining Security within Borders: Towards a Permanent State of Emergency in the EU?" *CEPS Policy Brief*, n. 41, (2003).

Member States face an emergency situation characterized by a sudden inflow of third country nationals, the Council can, acting by qualified majority on a proposal from the Commission (and with no consultation with the European Parliament), adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned. Thus the possibility, which under the Maastricht Treaty was applicable only for the imposition of visa requirements, is now applied to the entirety of Title IV EC.

3. Differentiation in the system

3.1. Being in and being out – the United Kingdom, Ireland and Denmark

A differentiation in the field of visa policy resulted from primary law in the case of three countries: the United Kingdom, Ireland and Denmark. Their special status was regulated by a number of Protocols to the Amsterdam Treaty. What unites them is their reluctance to participate in the communitarization of the field of justice and home affairs in general, and in the field of visas in particular. An additional element is the integration of the Schengen *acquis* into the institutional and legal framework of the European Union; an issue of decisive importance for the United Kingdom and Ireland, two non-Schengen countries. All visa measures adopted under the rules of the Maastricht Treaty were applicable to all Member States. The situation under the Amsterdam Treaty was different.

3.1.1. The United Kingdom and Ireland

The situation of the United Kingdom and Ireland in the field of visa policy was regulated by three protocols:

- Protocol (No 2) integrating the Schengen acquis into the framework of the European Union (1997)
- Protocol (No 3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997)

- Protocol (No 4) on the position of the United Kingdom and Ireland (1997)[39].

First of all, according to Article 4 of Protocol No 2 on Schengen, Ireland and the United Kingdom were not bound by the Schengen *acquis*, but might at any time request to take part in (opt-in) some or all of the provisions of this *acquis*. The decision on this participation was to be taken by unanimity of the participating in Schengen Member States and of the representatives of the government of the state concerned. Pursuant to these rules, the Council accepted the UK's application for partial participation in Schengen in 2000,[40] and the parallel Irish application appeared in 2002.[41]

The rules of Protocol No 3 on Article 14 of the EC Treaty, in particular Article 1, authorized the United Kingdom to exercise such controls on persons seeking to enter its territory as it considers necessary (in the case of citizens entitled to such a right based on the EEA rules or other international treaties) and to determine whether or not to grant other categories of traveller permission to enter the United Kingdom. This right is notwithstanding Article 14 of the EC Treaty, any other provision of that Treaty or of the EU Treaty, any measure adopted under those Treaties or international agreements.

Article 2 of the Protocol No 3 allowed the United Kingdom and Ireland to maintain the "*arrangement between them relating to the movement of persons between their territories ("the Common Travel Area")*". As long as they maintain such arrangements, the possibilities given to the United Kingdom in Article 1 are also to be applied to Ireland. Article 3 also authorizes the other Member States to maintain controls on their internal borders with the United Kingdom and Ireland.

Finally, Protocol No 4 on the position of the United Kingdom and Ireland set out rules for the participation of these two countries in the adoption of measures under Title IV

[39] After the entry into force of the Treaty of Lisbon, respectively, Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union; Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the functioning of the European Union to the United Kingdom and to Ireland and Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[40] Decision 2000/365/EC (O.J. 2000, L 131/43).

[41] Decision 2002/192/EC (O.J. 2002, L 64/20).

of the EC Treaty. In principle, the two countries did not take part in the adoption of such measures.[42] As a result:

> none of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland.[43]

However, there remained the possibility of participation in the negotiations and adoption of any measure proposed under Title IV, by notifying the President of the Council in writing, within three months of the presentation of the proposal to the Council.[44] To avoid the danger of possible blockage in the adoption of a measure due to the position of the United Kingdom and Ireland, paragraph 2 of Article 3 ensured that "if after a reasonable period of time" a measure cannot be adopted with the United Kingdom and Ireland taking part, the Council may adopt such a measure without the participation of these two countries. A possibility also existed for participation in measures already adopted, subject to a Commission decision in accordance with Article 11 (3) EC.[45] Ireland retained the possibility to declare that it no longer wished to be covered by the terms of this Protocol, in which case normal Treaty provisions would apply.

Article 7 of Protocol No 4 also clarified the relations between the different protocols. It holds that "Article 3 and 4 [of Protocol No 4] shall be without prejudice to the Protocol integrating the Schengen acquis into the framework of the European Union."

On the basis of these three protocols, the United Kingdom and Ireland participated in a number of measures both building on the Schengen *acquis* and based on Title IV EC. For example, in 1999 the United Kingdom applied to participate in the Schengen provisions on police and judicial cooperation, drugs and the Schengen Information System. The United Kingdom (but not Ireland) also intended to participate in Regulation 2252/2004 on biometric features in EU passports and in Regulation 2007/2004 establishing FRONTEX (classified as measures "building upon the

[42] Article 1 of the Protocol.
[43] Article 2 of the Protocol.
[44] Article 3 of the Protocol.
[45] Article 4 of the Protocol.

Schengen *acquis*") under Article 5 of the Schengen Protocol. The Council, however, excluded the United Kingdom's participation in both regulations on the grounds that the right to participation created by Article 5 of the Schengen Protocol relates exclusively to measures building on provisions of the Schengen *acquis,* in which the United Kingdom already participates by virtue of the Council Decision governing the United Kingdom's participation in the Schengen *acquis* adopted pursuant to Article 4 of the Schengen Protocol. The Council interpretation was supported by the Court of Justice. The Court held that:

> The second subparagraph of Article 5 (1) of the Protocol integrating the Schengen acquis into the framework of the European Union must be interpreted as being applicable only to proposals and initiatives to build upon an area of the Schengen acquis which the United Kingdom and/or Ireland have been authorised to take part in pursuant to Article 4 of that protocol.[46]

As far as participation in the visa field is concerned, the United Kingdom also participates in the 2002 regulation on visa formats[47] but not in the 2001 Visa Regulation defining the visa lists.[48] Ireland does not participate in either instrument.[49]

3.1.2. Denmark

The situation of Denmark is different because unlike the United Kingdom and Ireland, it is one of the Schengen states. To recall, there were no special arrangements for Denmark in the field of visa policy in the Maastricht Treaty, so it was bound by all the measures adopted during this period.

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[46] Case C-137/05, *United Kingdom* v. *Council* [2007] ECR I-11593, para 50 of the judgment; and Case C-77/05 *United Kingdom* v. *Council* [2007] ECR I-11459, para 68 of the judgment.

[47] Council Regulation (EC) No 334/2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas**,** O.J. 2002, L 53.

[48] Meanwhile, a new action for annulment was brought by the United Kingdom and Ireland against the Council with regard to the VIS Police Access Decision; on the grounds that the Council wrongly considered that the measure constituted a development of provisions of the Schengen acquis in which the United Kingdom and Ireland do not take part, namely the common visa policy. See Case C-482/08.

[49] While it is clear that the United Kingdom and Ireland do not participate in the 2001 Visa Regulation and its subsequent amendments, their position in relation to the 1999 Visa Regulation raises some questions. One possible interpretation is that Regulation 574/1999 still continues to apply to these two Member States, because they did not participate in Regulation 539/2001, which repealed the 1999 measure. Howecer, from a practical point of view, the UK still seems to be in compliance with the 1999 Regulation, as all countries on the common black list then are still on the UK black list today.

However, with the entry into force of the Amsterdam Treaty, its situation was modified. There are two protocols regulating the position of Denmark. These are:

- Protocol (No 2) integrating the Schengen acquis into the framework of the European Union (1997); and
- Protocol (No 5) on the position of Denmark (1997)[50].

Protocol No 2 provided in its Article 3 that Denmark would continue to be bound by the Schengen *acquis* under international law in its relations with the Member States that were signatories to the Schengen convention. Thus, the parts of the Schengen *acquis* integrated in Title IV EC are binding in Denmark but they have an effect as international law rules and not Community law rules.

Protocol No 5 established the rule that Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title IV EC.[51] However, it can opt-in and within six months of their adoption decide whether to be bound by them under international law.[52] Denmark has consistently applied this option to measures concerning visas and border controls.[53]

[50] Protocol (No 22) on the position of Denmark.
[51] Article 1 of Protocol No 5.
[52] Article 5 of Protocol No 5.
[53] Council document 14241/01, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 23 November 2001 (concerning implementation in Danish law of Council Regulation (EC) No 789/2001, Council Regulation (EC) No 790/2001, two Council Decisions updating annexes of the Common Manual and the Common Consular Instructions);Council doc. 9963/02, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark 20 June 2002, (concerning implementation into Danish law of Council Regulation (EC) No 1091/2001, Council Directive 2001/40/EC, Council Decision 2001/420/EC, Council Decision 2002/44/EC); Council doc. 14807/03, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 14 November 2003 (concerning implementation in Danish law of Council Decision 2002/586/EC and Council Decision 2002/585/EC); Council doc. 14822/03, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 14 November 2003 (concerning implementation in Danish law of Council Decision 2002/352/EC and Council Decision 2002/587/EC); Council doc. 14588/03, Notification by Denmark concerning implementation in Danish law under Article 5 of the Protocol on the position of Denmark, 14 November 2003 (concerning implementation in Danish law of Council Regulation (EC) No 693/2003, Council Regulation (EC) No 694/2003, Council Regulation (EC) No 415/2003 and Council Decision updating Schengen Consultation Network); Council doc. 5096/04, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 9 January 2004 (concerning implementation in Denmark of Council Decision 2003/454/EC, Council Regulation (EC) No 1295/2003, Council Decision 2003/585/EC and Council Decision 2003/586/EC); Council doc. 12195/04, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the

As an exception to the above rules, Denmark was fully subject to EC measures regarding visa format and the adoption of a list of countries whose nationals are subject to a visa requirement when crossing the EC external borders.[54] Note that these two fields were the only ones falling under the scope of the former Article 100c and thus were already communitarized under the Maastricht Treaty.

Thus, the position of Denmark is a clear example of the tensions arising in the transfer of sovereignty to the Community. While Denmark expressed its willingness to participate in the cooperation under Title IV, it insisted that it was bound by it under international law rules and not Community law rules. In some cases this might lead to the conclusion of an international agreement between Denmark and the Community.[55]

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position of Denmark, 10 September 2004 (concerning implementation in Danish law of Council Regulation (EC) No 377/2004, Council Decision 2004/191/EC, Council Decision 2004/466/EC, Council Decision 2004/512/EC); Council doc. 12111/04, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 7 September 2004 (concerning implementation in Danish law of Council Decision 2004/17/EC); Council doc. 12907/04, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 29 September 2004 (concerning implementation in Danish law of Council Decision 2004/574/EC, Council Decision 2004/573/EC, Council Decision 2004/581/EC and Council Directive on the obligation of carriers to communicate passenger data); Council doc. 10087/05, Notification by Denmark of implementation in Danish law, under Article 5 of the Protocol on the position of Denmark, 14 June 2005 (concerning implementation in Danish law of Council Regulation (EC) No 2252/2004 – security features and biometrics in passports) ; Council doc. 5420/06, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 17 January 2006 (concerning implementation in Danish law of Regulation (EC) No 2046/2005 and Recommendation of the European Parliament and the Council 2005/761/EC), Council doc. 7613/07, Communication from Denmark concerning implementation in Danish law pursuant to Article 5 of the Protocol on the position of Denmark, 16 March 2007 (concerning implementation in Danish law of the Local Border Traffic Regulation and Council Decision 2006/684/EC), Council doc. 11252/07, Notification by Denmark concerning implementation in Danish law, under Article 5 of the Protocol on the position of Denmark, (concerning implementation in Danish law of Decision No 574/2007/EC) 26 June 2007, Council doc. 13122/07, Notification by Denmark concerning implementation in Danish law, under Article 5 of the Protocol on the position of Denmark, (concerning implementation in Danish law of Regulation (EC) No 863/2007), 20 September 2007, Council doc. 12641/08, Notification by Denmark concerning implementation in Danish law, under Article 5 of the Protocol on the position of Denmark, (concerning implementation in Danish law of Regulation (EC) No 296/2008 – Schengen Borders Code and Council Decision 2008/374/EC), 5 September 2008 and Council doc. 8071/09, Notification by Denmark concerning implementation in Danish law, under Article 5 of the Protocol on the position of Denmark, (concerning implementation in Danish law of Council Decision 2008/859/EC, Council Decision 2008/905/EC, Council Decision 2008/910/EC), 26 March 2009. All of the above acts are binding upon Denmark under international law.

[54] Article 4 of Protocol No 5.

[55] See, for example, the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2005, L 299.

3.2. The willing outsiders

There is a group of countries which for various reasons have expressed interest in joining the Schengen cooperation without necessarily joining the EU. Depending on whether such cooperation was established before or after the integration of the Schengen *acquis* into the European Union, the legal mechanisms chosen to implement it and the legal effects of it differ.

3.2.1. Iceland and Norway[56]

The need to find a way to integrate non-EC Member States into Schengen arose already with the accession of the three Nordic Members – Denmark, Sweden and Finland. As described in the previous section, due to the existing Nordic Passport Union, it was impossible to integrate only some of the Scandinavian countries without integrating the rest. Thus, the same date on which the Agreements on the accession to Schengen of Denmark, Finland and Sweden were signed, 19 December 1996,[57] a Co-operation Agreement was also concluded between the 13 Schengen partners on one side and Norway and Iceland on the other.

The legal effects and the exact position of Iceland and Norway are the subject of another discussion. It seems that from the internal point of view of the Schengen Member States, the two countries do indeed cooperate but are not full members of the group. This fact can be indirectly supported by the lack of cooperation agreement in the list of the Schengen *acquis.* In accordance with the provisions of the Schengen protocol of the Amsterdam Treaty, the Schengen *acquis* was integrated into the European legal order; there is an official list of what exactly comprises the *acquis* at the date of incorporation. And on that list (containing the Schengen Agreement, the Schengen Convention, all Accession Agreements and most of the decisions of the Executive Committee), the Co-operation agreement with Iceland and Norway is missing. This would suggest that the agreement itself was not considered part of the Schengen *acquis* but rather an issue of bilateral international relations.

[56] An interesting analysis of the participation of the Iceland and Norway can be found in EMERSON, VAHL AND WOOLCOCK, *Navigating by the Stars: Norway, the European Economic Area and the European Union*, *Centre for European Policy Studies*, (Brussels, 2002).

[57] See O.J. 2000, L 239.

Maintaining the status of Iceland and Norway following the integration of the Schengen *acquis* into the European legal order proved a particularly complicated legal exercise. A system of agreements was put in place, which on one hand had to make possible the association of both countries with the Schengen cooperation in the framework of the European Union and on the other had to regulate the relations between Iceland and Norway and the UK and Ireland, considering the later non-participation in the further development of Schengen.

The result was two agreements and one institutional innovation. The provisions of Article 6 of the Schengen Protocol foresaw that the appropriate procedures for the cooperation should be established in an agreement to be concluded with Norway and Iceland by the Council. In addition, an agreement had to be concluded in order to establish the rights and obligations between Ireland and the UK on one hand, and Iceland and Norway on the other.

Norway and Iceland joined the Schengen system as associated members as a continuation of the Nordic Passport Union.[58] The preamble of the Association Agreement refers to the Agreement of Luxembourg of 1996, the purpose of which was to "preserve the existing regime" of free movement within the Nordic Union following the accession to Schengen of Denmark, Finland and Sweden. However, considering the length of the ratification process, by the time the 1996 Luxembourg Agreement was ratified,[59] there were already new institutional arrangements for Schengen and thus the need for the new agreement arose.

The Association Agreement with Norway and Iceland states in its Articles 1 and 2 that the parties are bound by the provisions of the Schengen acquis. Only certain, minor, provisions are excluded from this (for example the responsibility for

[58] Agreement concluded by the Council of the European Union, the Kingdom of Norway and the Republic of Iceland and concerning the latter's association with the implementation, application and development of the Schengen *acquis*, O.J. 1999, L 176, pp. 36-40. For an early analysis see, P. CULLEN, "The Schengen Agreement with Iceland and Norway: Its Main Features", *ERA Forum*, Vo. 2, Number 4, December 2001

[59] France, for example, ratified it only in 1999.

processing asylum applications).[60] Norway and Iceland thus had (and still have) to apply the vast bulk of the Schengen *acquis* which includes also all the measures adopted by the Executive Committee, for example the measures associated with the abolition of internal frontier controls and the countervailing measures regarding the control of external frontiers, notably those connected to police, security and the Schengen Information System (SIS).

Within the EEA Norway and Iceland also have to accept all acts by the EU that develop the acquis. But the EEA contains an (unused) opt-out clause. In this sense the obligation under the Schengen Association Agreement for Norway and Iceland to accept all acts by the EU which amend or build upon the Schengen *acquis* is even stronger: any refusal to adopt new Schengen acts (even only one) would mean having to leave the system.

The need to involve all parties, bound to implement the Schengen *acquis,* in the process of the preparation of new acts is acknowledged by the preamble of the Schengen Association Agreement. The preamble refers to the need to "*involve all parties*" in discussions "*at all levels*" and "*in an appropriate fashion*" regarding the implementation of the agreement. The strcture that ensures this invomvement is the so-called "Mixed Committee" (of EU and non-EU states).

The Mixed Committee works legally "*outside the institutional structure of the Union*"[61] and can meet at three different levels: at the level of ministers, senior officials or experts. The Schengen Association Agreement sets out in detail its functions and powers, as well as the the relationship between the committee and the EU institutions, in particular the Commission and the Council.

The Mixed Committee is considered as a "decision-shaping" body; it is more than a mere discussion forum but it is not a decision-making body. Its wider mission, set out in Article 4 of the Schengen Association Agreement is to address all matters relating to the development of the Schengen *acquis,* in particular all new acts or measures to

[60] However, later an additional agreement dealing with this issue was also signed.

[61] See preamble to the Schengen Association Agreement, op.cit.

be adopted by the EU. As far as Schengen-related proposals are concerned, they are first drafted by the Commission or the EU Member States. However, the associated states are also allowed to "*to take suggestions in the Mixed Committee*" for initiatives or proposals[62].

Although the decisions are taken by the respective EU institutions, the Schengen Association Agreement imposes some obligations on the Council and on the Commission. For example, Article 5 requires the Council to inform the Mixed Committee of "*preparation within the Council of any acts or measures which may be relevant to this Agreement*", while Article 6 requires the Commission to "*informally seek advice*" from experts of Norway and Iceland when drafting new legislation in fields covered by the agreement.

Despite of the special place of the Mixed Committee in the Schengen Association Agreement, its role is not of a decision-maker but rather of a decision-shaper. This is clearly confirmed by the first sentence of Article 8 of the Association Agreement clearly states that: "*The adoption of new acts or measures … shall be reserved to the competent institutions of the European Union*". Thus, the decision-making is reserved to the Council alone or to the Council and the European Parliament. However, one should not underestimate the fact that the Council in make cases takes decision more or less 'automatically' on the basis of recommendations of its committees and working parties, including the Schengen Mixed Committee.

These Schengen arrangements offer much wider possibilities for participation in the legislative process that those set out in the EEA. The fact that Norway and Iceland have the possibility to have working sessions with the members of the corresponding Council bodies in the Mixed Committee is extremely important. This model of participation was also sought by Norway and its EFTA partners for the EEA, but was rejected by the EU. That the Schengen associates are able to participate so extensively is due to fortuitous historical circumstances, mainly to the existence of the Nordic Passport Union and because the Schengen system began as an intergovernmental mechanism outside the EU. It is highly unlikely that the EU would extend similar

[62] Article 4(4) of the Schengen Association Agreement, op.cit.

rights of participation to Norway had its Schengen association been negotiated today[63].

With regard to implementation at national level, Article 8 of the Schengen Association agreement provides that it is for national authorities to "*decide independently whether to accept [the] contents [of measures building on the Schengen acquis] and to implement [them] in their internal legal order.*" The article recognizes that in order to become binding certain acts may have to be made subject to the fulfilment of constitutional procedures.

Norwegian and Icelandic sovereignty is thus protected, at least at face value, in the sense of autonomous decision-making according to customary constitutional procedures. However, Article 2 (3) of the Agreement states that "*the acts and the measures taken by the European Union amending or building upon the provisions* [of the Schengen acquis*] to which the procedures set out in this Agreement have been applied, shall also, without prejudice to Article 8, be accepted, implemented and applied by Iceland and Norway*". Thus, the possibility for "opting out" of individual Schengen measures does not exist for Norway and Iceland. What is provided for instead is the much more unflexible possibility for termination of the whole Schengen Association Agreement, either under a process of "consensual termination", or under "non-consensual termination".

The "non-consensual termination" can occur in two cases. The first covers the case of Article 8(4) whereby Norway or Iceland fail to agree to or to notify a particular measure for constitutional or other reasons. When such circustances arise, the agreement is deemed terminated with respect to the country concerned "*unless the Mixed Committee, after a careful examination of ways to continue the agreement, decides otherwise…*". The second case of "non-consentual termination" is covered by Article 11 and concerns disputes about the implementation of measures in Norway or Iceland. This situation can occur if a "substantial difference" in application or interpretation of Schengen measures persists between Norwegian and Icelandic courts or authorities of the Member States or the European Court of Justice. Before the

[63] See EMERSON, VAHL AND WOOLCOCK, op.cit.

agreement is terminated, Article 11 provides for a set of dispute-resolution procedures involving the Mixed Committee. For Schengen disputes, there is no equivalent to the EFTA (EEA) Court for EEA.

All EC visa rules are fully applicable to Norway and Iceland, as from March 2001, following the Schengen Association Agreement with those states. However, their participation in international agreements in this field is somewhat more complicated. For example, they do not participate in the visa facilitation agreements concluded by the Community, but are encouraged to conclude bilateral agreements to that effect with the countries concerned.

3.2.2. Switzerland[64]

The decision of Switzerland to participate in Schengen is interesting because, unlike the case of Iceland and Norway, there were no legal or institutional factors pushing towards this decision. Switzerland was not part of any free movement arrangement prior to joining Schengen, so the institutional push factors did not exist. At the same time, travel (despite the fact that its territory is completely encircled by Schengen states) was not particularly difficult. Thanks to bilateral agreements, most of the EC Member States did not require a passport (Swiss citizens had to present only an ID card at the Swiss border crossings). This was not the case for the third country nationals who had to be checked for possession of a valid travel document and, where necessary, a Swiss visa.

Two obvious advantages to joining Schengen could thus be summed up as: the externalisation of the border controls (as a Schengen member Switzerland will not have an external land border); access to the Schengen Information System and access to the police cooperation provisions of the group. It appears that the latter two considerations were key.

[64] For an analysis of the bilateral agreements with Switzerland, see VAHL AND GROLIMUND, *Integration without Membership: Switzerland's Bilateral Agreements with the European Union*, Centre for European Policy Studies, (Brussels, 2006).

As all negotiations took place after the entry into force of the Amsterdam Treaty, they are an example of the functional possibility within the system to accommodate the inclusion of outside (non EC) Member States. However, Switzerland benefits from a special position geographically, economically and politically in relation to the EU, and for this reason it is difficult to find another third country that could follow in its steps.

The agreement with Switzerland took a long time to conclude. The authorization to start negotiations with Switzerland was given to the Commission on 17 June 2002. The agreement was signed on behalf of the European Community on 26 October 2004. However, the Council Decisions for its conclusion were adopted only on 28 January 2008. A possible explanation for the delays might be the unusual legal framework chosen for the agreement.

Indeed, it is the first time that an agreement is concluded between the European Union, the European Community and a third country. Due to the fact that the Schengen *acquis* has two distinct parts – a Community one and a Union one, it was deemed necessary to have both the European Union and the European Community as parties to the agreement. In fact, it was signed twice by the Presidency of the Council (once on behalf of the Union and once on behalf of the Community) and by the representative of the Commission (on behalf of the Community).[65]

Two Council Decisions were also adopted to that end. One – Council Decision 2008/146/EC[66] on the conclusion of the agreement on behalf of the European Community, and another – Council Decision 2008/149/JHA[67] on the conclusion of the agreement on behalf of the European Union. Although the two decisions have

[65] See Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, O.J. 2008, L 53/52.

[66] Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, O.J. 2008, L 53/1.

[67] Council Decision 2008/149/JHA of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, O.J. 2008, L 53/50.

virtually equivalent texts, there are several important differences. Firstly, this is the legal basis. The legal basis for the conclusion on behalf of the European Community is Article 62, and point 3 of the first subparagraph of Article 63, and Articles 66 and 95, in conjunction with the second sentence of the first subparagraph of Article 300 (2) and the first subparagraph of Article 300 (3) EC. The legal basis, in the case of conclusion on behalf of the European Union, is Article 24 and 38 EU. Secondly, in terms of content, the two Council Decisions refer respectively to the part of the *acquis* having as a legal basis the EC Treaty in the one case, and the EU Treaty – in the other. Finally, the special position of the UK and Ireland is acknowledged in both Council Decisions but only the one on the conclusion on behalf of the European Community contains reference to the special position of Denmark.

As to the substance of the agreement, it closely follows the structure of the agreement already concluded with Iceland and Norway; therefore it will not be studied in detail here.

3.3. Differentiation in practice – the case of the 2001 Visa Regulation

The legal basis for the adoption of the EU visa lists was included in Article 62 (2) (b) (i) and provided for the adoption by the Council of "*the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*". In light of the Community objective of internal frontier abolition, which Title IV is meant to serve, such black and white lists were to be exhaustive (i.e. include all third countries).[68]

The Council duly adopted the Regulation "*listing the third countries whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that requirement*" (the Visa Regulation) on 15 March 2001, respecting the five year time limit prescribed by Title IV EC and the further restrictions to this time limit envisaged by the Vienna Action Plan.[69]

[68] MELONI, op. cit., p. 88.

[69] Regulation 539/2001, O.J. 2001, L 81/1. The Vienna Action Plan listed the Visa Regulation among the measures to be taken in two years from the entry into force of the Treaty of Amsterdam.

The way in which the specific rules governing the position of the United Kingdom, Ireland and Denmark on the one hand and Iceland on Norway on the other were applied in the case of the Visa Regulation, will be discussed below.

With regards to the position of the United Kingdom and Ireland in the new Visa Regulation, the Council considered the measure to be "*building upon the Schengen acquis*" and thus the opt-in was to be regulated by Article 4 of the Protocol on the position of the United Kingdom and Ireland. As a result, the United Kingdom and Ireland are not taking part in the Community visa regime[70] or the visa lists. However, the United Kingdom can participate in discussions in the Council when changes to the visa lists are discussed.

As far as Denmark is concerned "*the measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States*" is one of the two exceptions to the opt-out from Title IV that the country was granted.

There are conflicting views as to the exact legal effect of this provision and consequently as to the position of Denmark as far as the Visa Regulation is concerned. MELONI[71] supports the view that the Regulation is binding on Denmark, but under international and not under Community law. She starts from the fact that the Council treated the Visa Regulation as "*a measure building upon the Schengen acquis*". Under the Protocol on the position of Denmark, Meloni argues, Denmark is not bound by the Regulation under Community law, but could, within six months, decide whether to be bound by it under international law. In this case, the direct applicability of the Visa Regulation in Denmark and the possibility of infringement actions before the Court of Justice would be excluded.

[70] The only exceptions being Regulation 333/2002 on visa stickers for persons coming from unrecognized entities (OJ 2002 L 53/4 and Regulation 334/2002 amending Regulation 1683/95 on common visa format (OJ 2002 L 53/7). in which the UK has opted in. For a review and evaluation of the opt in in the United Kingdom, see the 7th Report of the House of Lords European Union Committee, The United Kingdom opt-in: problems with amendment and codification, 2008-9, available at: http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/55/5503.htm#note19

[71] MELONI, op. cit., p. 94.

KUIJPER convincingly arrives at an opposing interpretation by accepting that the measures linked to the visa lists, and in particular the black visa list previously based on Article 100cm, should remain for Denmark's Community Law, according to Article 4 of the Protocol on Denmark.[72]

The position of Denmark in this case is similar to that of Iceland and Norway, which were introduced to this new area of Community competence as a result of the integration of the Schengen *acquis* into the European legal order. A discussion of the legal problems resulting from this integration was provided in Chapter 1, and here only the aspects related to visa lists will be underlined. According to the two Council Decisions determining the legal basis for each of the provisions, or decisions which constitute the Schengen *acquis*,[73] the Schengen Convention provisions on short-term visas (Articles 9-17) and some of the Executive Committee Decisions on visas have been allocated to Article 62(2)(b) EC Treaty. The fact of allocation transforms the previously intergovernmental provisions into secondary Community law in this area for the 13 Schengen states, alongside and going beyond the existing Community instruments on the list of third countries whose citizens do not require a visa. From that moment, all these decisions will have as their legal basis Article 62(2)(b) without the procedural requirements for the implementation of measures, on the basis of this provision as provided for in Article 67 having been complied with. Moreover, through the allocation to Article 62(2)(b), European Community law is created that does not apply to the United Kingdom and Ireland (unless they opt-in) and binds Denmark under general international law.

Considering that two non-EU states were party to the Schengen Convention, before the entry into force of the Amsterdam Treaty, their status needed to be regulated through a special agreement. The Agreement[74] provided that the participation of

[72] KUIJPER, "Some legal problems associated with the Communitarization of Policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen *acquis*", *Common Market Law Review*, 2000, n. 37, pp. 345-366. Article 4 of the Protocol on Denmark reads: "Articles 1, 2 and 3 shall not apply to measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas".

[73] Decision 1999/436/EC, O.J. 1999, L 176/17.

[74] Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*, O.J. 1999, L 176.

Iceland and Norway in Schengen aspects of the Union and the Community is restricted to decision-shaping and does not extend to decision-making. This is procedurally ensured through a Mixed Committee which mirrors the activities of all Council bodies but cannot make decisions. The decision-making occurs in the Council without Iceland or Norway's presence. These two countries are also bound to carry out the Council's Decisions and measures in the areas covered by the Agreement. One of the areas explicitly identified by the Council is that of visas for short stay and the list of countries with a visa exemption.[75]

As the above indicates, the special arrangements for a number of Member States (the United Kingdom, Ireland and Denmark) and a number of Schengen but non-EU states have created a complex system of decision-making in the Council. The examples provided by Kuijper illustrate that:

> When measures are deemed to build on the Schengen acquis, Norway and Iceland may participate in the decision-shaping but outside of the Council in the Mixed Committee; the UK and Ireland may participate if they elect to do so, but in the Council; and Denmark may implement the measures afterwards. Denmark, Iceland and Norway implement the measures as intergovernmental obligations, outside the jurisdiction of the ECJ. Ireland and the UK participate in the measures on the normal Community basis. If measures are considered not to be binding under Schengen, then the UK and Ireland may still opt in, but Iceland and Norway are excluded and probably Denmark too (unless there was willingness to grant Denmark either a certain leeway to decide for itself what measures "build upon Schengen", or a broad ad hoc interpretation of the possibility for Denmark to decide whether or not to invoke the protocol granting it an exception).[76]

This situation is somewhat altered by the two ECJ judgments[77], discussed earlier, which show that the UK and Ireland can only opt-in under Article 5 when they are willing to be bound by the basic Schengen acquis rule on which the proposed measure builds further (Article 4).

4. Trends in regulation post-Amsterdam

Following the signature of the Amsterdam Treaty, the adoption of measures in the area of freedom, security and justice in general and in the field of visa policy, in

[75] Council Decision of 17 May 1999 on certain arrangements for the application of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (Decision 1999/437/EC), O.J. 1999, L 176/31.

[76] KUIJPER, op. cit.

[77] C-137/05 and C-77/05, op.cit.

particular, developed in a systematic manner. Always, the general guidelines and political impetus came from the Council or the European Council. On this basis the Commission prepared action plans typically covering five years. At the end of the period there is an extensive reporting and evaluation both with regard to the achievements but also with regard to the concrete instruments adopted during that period.

This section will look at the development of the regulation in the field of visa policy from two sides. Firstly, through a chronological analysis of the objectives and the achievements in the programmes and action plans to date. Secondly, through the identification of trends based on reactions to internal or external challenges, namely the move towards codification, the measures adopted in relation to terrorism and the measures adopted in response to enlargement.

4.1. Chronology

Vienna Action Plan 1998. The first Action which looked at how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice was adopted by the Vienna European Council on 3 December 2008[78] (hereafter the Vienna Action Plan). The action plan gives substance and defines the three core concepts of freedom, security and justice and on this basis defines priorities for the next five years, setting out a timetable of measures necessary to achieve the area of freedom, security and justice. Based on Title IV of the EC Treaty, Title VI of the Treaty on the European Union and the Schengen *acquis* incorporated into these Treaties, the Plan provides a coherent framework for the development of EU action, while guaranteeing tighter judicial and democratic review by the Court of Justice and the European Parliament.

The way in which the priorities have been identified by the Council and the Commission and the way in which they intended to implement them is based on a number of principles. First and foremost, these are the principles of the Amsterdam

[78] Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, Council doc. 13844/98, O.J. 1999, C 19/1.

Treaty itself, but in addition: the principles of subsidiarity, solidarity, operational efficiency, the principle that responsibility for safeguarding internal security rests with the Member States, and finally the realistic approach are mentioned (in that order).[79]

The measures related to visa form part of the section dedicated to "Measures in the field of the asylum, external borders and immigration". The Action Plan sets two groups of measures – to be adopted respectively within two years and within five years. In the field of visas those measures are:

To be taken within two years:[80]

(i) procedures and conditions for issuing visas by Member States (resources, guarantees of repatriation or accident and health cover) as well as the drawing up of a list of countries whose nationals are subject to an airport transit visa requirement (abolition of the current grey list);

(ii) define the rules on a uniform visa (Article 62(iv) of the EC Treaty);

(iii) draw up a regulation on countries: whose nationals are exempt from any visa requirement in the Member States of the European Union, and those whose nationals are subject to a visa requirement in the Member States of the European Union (Article 62 (2)(b)(i) of the EC Treaty);

(iv) further harmonizing of Member States' laws on carrier liability.

The list of short-term measures clearly shows the intention of the Commission to propose measures all in the fields which under the Maastricht Treaty system were subject to competence disputes (e.g. visa white list, airport transit visas).

To be taken within five years:[81]

(i) extension of the Schengen representation mechanisms with regard to visas; according to the plan a discussion could be initiated on the possibility of establishing an arrangement between the Member States, which will improve the possibility of preventing visa applicants from abusing the

[79] Paragraph 24 of the Vienna Action Plan, op. cit.

[80] Paragraph 36 (d) of the Vienna Action Plan, op. cit.

[81] Paragraph 38 (d) of the Vienna Action Plan, op. cit.

foreign representations of one or more Member States in order to gain access to another Member State, which at time of application was the actual country of destination; and

(ii) attention will be given to new technical developments in order to ensure, as appropriate, an even better security of the uniform format for visas.

Tampere Programme 1999-2004. One year after the adoption of the Vienna Action Plan, The Tampere European Council in October 1999, adopted what later became known as the Tampere Programme.[82] The Programme took the objective of the progressive establishment of the area of freedom, security and justice as a basis and then set out policy guidelines and practical objectives, with a timetable for their attainment. The Commission, at the request of the European Council, drew up a scoreboard to review progress every six months.

Visa policy is mentioned once in the Tampere Programme in the context of the management of migration flows. Paragraph 22 of the Council conclusions states: "*A common active policy on visas and false documents should be further developed, including closer cooperation between EU consulates in third countries, and where necessary, the establishment of common EU visa issuing offices*".

A special paragraph addresses the potential challenges arising from enlargement but as the text clearly states, at that point in time the priority was the protection of the external borders and no concern as to the special interests of the then future Member States is iterated. Paragraph 25 reads:

> 25. As a consequence of the integration of the Schengen acquis into the Union, the candidate countries must accept in full that acquis and further measures building upon it. The European Council stresses the importance of the effective control of the Union's future external borders by specialized trained professionals.

The Tampere Programme also invited the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries, based on the powers

[82] European Council Tampere, "Council conclusions", 15-16 October 1999.

which the Amsterdam Treaty conferred on the Community in the field of readmission. Interestingly enough, the European Council also stressed that "consideration should also be given to rules on internal readmission".

When the Commission reported on the achievements of the Tampere programme in 2004,[83] there was one main instrument referred to: the Visa Regulation adopted in 2001.[84] However, in its orientations for the future five year programme, the Commission stresses four elements related to the visa policy:[85]

> (i) in short and medium term, close attention is to be paid to establishing the conditions in which internal border checks can be abolished with the new Member States;
> (ii) visa policy will have to address serious concerns regarding document security and allow for improved consular cooperation. The work started on biometric data in travel and identity documents, in particular passports, must also continue;
> (iii) The Visa Information System (VIS) and the new Schengen Information System (SIS II) must come into operation and their full potential should be used;
> (iv) finally, there is a need for greater cooperation with neighbouring countries, and in particular countries with which we share borders, consistent with the new Union neighbourhood policy.

The Hague Programme 2004-2009.[86] This is the first programme to be adopted following the Eastern enlargement. Again it states that it is grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States. The programme also states that "freedom, justice, control at the external borders, internal security and the prevention of terrorism should be considered indivisible within the Union as a whole.

In the field of visa policy, the European Council underlines the need for further development of the common visa policy as part of a multi-layered system aimed at

[83] Commission Staff Working Paper, "The Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations – List of the most important instruments adopted", COM (2004) 401 final, SEC (2004) 680, Brussels, 2 June 2004, p. 12.

[84] Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those who are exempt from that requirement.

[85] Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, SEC (2004) 680 and SEC (2004) 693, COM (2004) 401 final, Brussels, 2 June 2004.

[86] Annex I to EU Presidency Conclusions, Brussels, 4-5 November 2004.

facilitating legitimate travel and tackling illegal immigration through further harmonization of national legislation and handling practices at local consular missions. The issue of a common visa issuing office, present already in the Tampere programme, is mentioned again here as a long term objective, also in the context of the creation of the future European External Action Service. As concrete steps, the European Council:

- Invites the Commission, as a first step, to propose the necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS, to review the Common Consular Instructions and table appropriate proposal by early 2006 at the latest;
- Stresses the importance of swift implementation of the VIS, starting with the incorporation of among others alphanumerical data and photographs by the end of 2006 and biometrics by the end of 2007 at the latest;
- Invites the Commission to submit without delay the necessary proposal in order to comply with the agreed time frame for the implementation of the VIS;
- Calls on the Commission to continue its efforts to ensure that the citizens of all Member States can travel without a short stay visa to all third countries whose nationals can travel to the EU without a visa as soon as possible;
- Invites the Council and the Commission to examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues.

The Action Plan[87] adopted by the Commission takes into account the fact that on 22 December 2004 the Council was able to adopt a decision applying co-decision and qualified majority voting to all Title IV measures, with the exception of legal immigration, as of 1 January 2005.[88] However, the Council decision does not make reference to the measures adopted on the basis of Article 62 (2) (b) covering the rules on visa. As explained earlier, for those measures two different sets of procedure apply based on Article 67 (2) and (4):

- for the visa list and the uniform format for visas - the Council acting by qualified majority voting on a proposal from the Commission and after consulting the European Parliament (Article 67(2));

[87] Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years: The Partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 184 final, Brussels, 10 May 2005.

[88] Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of the Treaty (O.J. 2004, L 396, p. 45)

- for procedures and conditions for issuing visas by Member States and rules on a uniform visa - co-decision automatically following the expiry of the transition period.

This is already considered the first success of the Hague Programme. The enhanced role of the European Parliament will improve the democratic legitimacy of the process while the rate of completion of the work is likely to increase with the abolition of the requirement of unanimity. However, the Commission notes with disappointment that the Council Decision of 22 December 2004 did not include, as foreseen by Article 67 of the Treaty, any provision adapting the powers of the Court[89].

The concrete priorities in the visa field form part of the heading "*Internal borders, external borders and visas: developing an integrated management of external borders for a safer Union*". The overall objective is the development of an integrated control of the access to the territory of the Union, based on an integrated management of the external border, a common visa policy and support of new technologies, including the use of biometric identifiers. In terms of concrete steps, the forthcoming abolition of controls of persons at internal borders with the new Member States are mentioned, as are the development of the Visa Information System and common visa application centres; the enhancing of document security and the inclusion of biometric identifiers.

The table below presents the list of measures and the timetable for their adoption as presented by the Commission.

[89] For a discussion of the changes in decision-making, see S. PEERS, "Transforming Decision-Making on EC Immigration and Asylum Law" (2005) 30 ELR 283.

Table 5.1. Visa policy and the development of the Visa Information System (VIS)

List of measures (2005)[90]	**Status in 2009**[91]
Meetings with third countries of the positive visa list in order to ensure visa-free travel for citizens of the Member States to all those third countries (*ongoing, to be combined with the review of the visa list*)	Ongoing, since 2005, the Commission publishes an annual report on reciprocity
Proposals related to the necessary amendments to further enhance visa policies and the establishment of common application centres for visas (2005)	Achieved
Regular review of the visa list (Regulation 539/2001) (*regularly*)	Achieved
Proposal on visa facilitation procedures for members of the Olympic Family – Turin 2006 (2005)	Achieved
Report on the implementation of Regulation 1295/2003 "Visa facilitation procedures for members of the Olympic Family – Athens 2004" (2005)	Achieved
Proposal amending the Common Consular Instructions on visa fees (2005)	Achieved
ARGO Work Programme (2005 and 2006)	
Proposals on transit: unilateral recognition of Schengen documents by the new Member States/recognition of Swiss residence permits by the Member States (2005)	Achieved
Recommendation for negotiation directives for visa waiver agreements between the EC and the third countries on the conditions to move freely within the Union for a period between three and six months (2005)	Delayed due to lack of legal basis in the current Treaties
Adoption of a proposal establishing a regime on local border traffic (2005)	Achieved
Report on the operation of the Kaliningrad transit scheme (2005)	Achieved
Kaliningrad facility (2005-2006)	Achieved
Schengen Facility for seven Member States (2005 and 2006)	Achieved
Specific recommendations for negotiating directives on visa facilitation with third countries in the context of the EC readmission policy, where possible and on the basis of reciprocity, in view of developing a real partnership on migration management issues (2005-2009)	Achieved
Proposal modifying the Common Consular Instructions on local consular cooperation (2006)	Achieved
Proposal on the review of Common Consular Instructions (2006)	Achieved
Technical implementation of the VIS, starting with the functionalities for processing alphanumeric data and photographs (2006) and adding the functionalities for biometric data (2006)	Delayed
Proposal on the creation of common consular offices (2007)	Achieved

[90] Based on Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years: The Partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 184 final, Brussels, 10 May 2005, pp. 19-20.

[91] Based on Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Justice, Freedom and Security in Europe since 2005: An evaluation of The Hague Programme and Action Plan – General overview of instruments and deadlines provided in The Hague Programme and Action Plan in the fields of justice, freedom and security: Institutional Scoreboard, SEC (2009) 767 final, Brussels, 10 June 2009, pp. 46-54.

4.2. Trends

The review of the main developments in the visa field since the entry into force of the Amsterdam Treaty confirms the view of visa policy as a flanking measure to the lifting of the internal border controls. This is how the Commission defines the objectives of the policy in its evaluation of the Hague Programme:[92]

> The common visa policy is an essential flanking measure which is needed to maintain integrity of an area without internal border controls and ensure a high level of security at the external borders while facilitating legitimate travel and tackling illegal immigration of third country nationals required to hold a visa for short stays within the Schengen area. A coherent EU approach and harmonized solutions based on biometric identifiers were considered necessary to achieve this objective.

The main trends in the development of the regulation in the visa field can be classified in three groups: the move towards codification, in response to terrorism and in response to enlargement.

The move towards codification. The need for codification was urgent after the entry into force of the Amsterdam Treaty, due to the incorporation of the Schengen *acquis* into the institutional and legal framework of the European Union. As the Schengen *acquis*, and the Common Consular Instruction, as parts of it, contained a wide range of documents that overnight became secondary law regulating visas, there was a need to codify the rules into a single document with a clear legal basis. Thus, the Common Consular Instructions were recast and incorporated together with all legal instruments governing the procedures and conditions for issuing visas into the proposed Code on visas.[93] This aimed to enhance transparency; clarify existing rules; introduce measures

[92] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Justice, Freedom and Security in Europe since 2005: An evaluation of the Hague Programme and Action Plan – An extended report on the evaluation of The Hague Programme, SEC (2009) 766 final, Brussels, 10 June 2009, pp. 32-34.

[93] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), O.J. 2009, L 243, pp. 1-58. For the proposal see COM (2006) 403 final, 19 July 2006 and also SEC (2006) 957 and SEC (2006) 958. The Visa Code is based on Article 62(2)(a) and (b)(ii) and establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six month period. It includes rules on: airport transit visas, procedures and conditions for issuing visas (examination of and decision on a visa application, issuing of the visa, modification of an issued visa, visas issued at the external border), administrative management and organisation and local Schengen cooperation. For further details, see Chapter 10.

to increase the harmonization of procedures; and increase legal certainty and procedural guarantees.

The codification in the visa field follows the completion of a similar exercise which lead to the adoption of the Schengen Borders Code which provides for the adoption of common measures on the crossing of internal borders by persons and border control at external borders.[94]

In response to terrorism. The threat of terrorism increases the number of security measures related to the creation of databases and the inclusion of biometric identifiers in the databases and identity documents, both passports and visas. It is not by accident that more than half of the measures adopted under The Hague Programme relate to one of the above groups. A legislative framework for the implementation and operation of the Visa Information System was adopted, as a system for the exchange of visa data between Member States, aimed at facilitating the checks at external border crossings points. Biometric identifiers were introduced for Member States' passports and other travel documents[95]; their residence permits[96]; and as a mandatory collection of such identifiers (facial image and ten fingerprints) from visa applicants[97].

[94] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2006, L 105, pp. 1–32. The Schengen Borders Code is based on Article 62 (1) and (2)(a) and provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union and establishes rules governing border control of persons crossing the external borders of the Member States. It includes rules on: external borders (crossing and conditions of entry, control qt the external borders and refusal of entry, staff and resources for border control and cooperation between Member States, specific rules for border checks), internal borders (abolition of border control at internal borders, temporary reintroduction of border controls).

The Visa Code and Schengen Borders Code regulate, in principle, different fields (visas and border control) with an intersection linked to the fact that one of the conditions for entry is "being in possession of a visa", which has to be issued respecting the rules of the Visa Code.

[95] See Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ L 385 of 29.12.2004, last amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 28 May 2009, OJ L 142, 6.6.2009, p. 1–4

[96] See Council Regulation (EC) No 380/2008 of 18 April 2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 115, 29.4.2008, p. 1–7

[97] Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60–81

In response to enlargement. The final group of measures which will be subject to a detailed analysis in the following chapters are those introduced in response to enlargement. These include the special arrangements for Kaliningrad; the introduction of rules on local border traffic; the development of a "visa reciprocity mechanism" and the negotiations on visa facilitation agreements.

5. Conclusions

The gradual 'communitarization' of visa policy began with the Maastricht Treaty. Only the visa lists (and visa format) were included in the Community pillar. An extensive interpretation of the Article 100c EC by the Commission proposals was challenged by the Member States, as they defended their sovereignty in this field. The Visa Regulation of 1995 alone resulted in two litigations involving all the institutions. But, albeit under limited conditions, all Member States participated in all visa measures at this stage.

The Amsterdam Treaty resolved most of the uncertainties with regard to the competence and transferred all visa powers into the first pillar. However, the resulting complete shift of competence from national to European level led to the alienation of those Member States whose political preferences and special interests could not be accommodated by the new system; either because of their particular situation, as in the case of the UK and Ireland, or because of their particular understanding of sovereignty. These Member States opted out while other countries outside the EU opted in, because their close relations with the EU made it attractive to be part of the Schengen area. This implied for them the obligation to adopt Community rules, although they did not take part in the decision-making process.

Thus, the shift of sovereignty to the European level led to a system of variable geometry, which over time became more and more complex. It included Member States that participated fully in all visa measures, Member States that did not but could participate, and non-Member States that participated fully in all measures.

Apart from the flexibility given to certain states within the framework of the Treaties, the secondary legislation, for the most part inherited from the Schengen era, also

allowed a certain functional flexibility, as opposed to the institutional one set out in the Treaties. An example of this, in the case of Greece, will be studied in the next chapter.

CHAPTER 6 – PROTOCOL MEETS PRAGMATISM - THE CASE OF GREECE

There is always a gap between the general rules enshrined in legislation and their actual implementation. Even in areas with a considerable degree of harmonization, it is possible for European law to set the general objective to be reached by the Member States, while leaving a certain amount of discretion as to the means of achieving this goal.

The same margin for manoeuvre can also be observed in the visa policy field, where despite the fact that it is being gradually taken over by the Community, it is still possible for Member States to achieve a certain degree of independence by using parts of the field that have not yet been harmonized.

It should be noted that in the field of visa policy, all the major elements have already been harmonized. This includes determining the countries whose citizens need visas; the format the visas should take and the related entry conditions and requirements. However, the types of document used to ascertain the facts on which the decision to allow entry is based are still in the hands of the Member States. The present chapter will analyze how this 'loophole' has been used in a specific case by Greece, whose use of special ID cards in effect led to a rather liberal access to the EU and the Schengen space, without the need to request any specific geographical or functional exemptions or opt-outs.

The case of Greece is particular, because prior to the Eastern enlargement, it was the only Schengen state with two specificities that became much more widespread after this enlargement. Namely, Greece shared land borders only with third countries that were on the Schengen and later the EU visa black list, and it also had a sizeable national minority in one of its neighbouring countries: Albania.

Section 1 briefly summarizes the general issues that arise when national minorities reside across the border. Section 2 provides a general and historical background to the case of Greeks in Albania; Section 3 analyzes the national legal framework, in particular the type of residence card used by Greece. It identifies its main characteristics, compares it to other types of residence card and outlines the basic rights it guarantees to its holders, also in comparison with the standard residence card. Section 4 places the Greek legal practice in the wider European context, by tracing the specific regulation related to residence cards in general and their role in the crossing of external borders and the free movement of third country nationals.

1. Cross-border national minorities as grounds for flexibility

The case of Greece is an interesting illustration of the problems that can arise when a country with a significant minority in a neighbouring country wishes to provide unhindered access to the territory of the motherland. This phenomenon mainly arises in areas with recently established borders, which were either disputed earlier or are the result of the exchange of territory after a major war and where the minority is not located in a Member State. Cross border minorities within the EU do not raise this issue because of the EC free movement rules.

One of the possible reactions of governments in such a situation is to grant citizenship to any member of the minority living abroad.[1] In many countries, the citizenship legislation provides for a fast-track or simplified procedure for people of the ethnic origin concerned, in order to acquire the citizenship of their motherland. The benefits of this citizenship are unquestionable; not only does it guarantee access to the territory with unproblematic entry, it also provides access to numerous services (education, health care, unemployment benefits and social services) that would otherwise be more difficult to obtain for non-citizens. Despite the obvious benefits of offering citizenship to minority members, in fact it is not so widely applied because of a number of complications inherent in the practice. These complications are mainly linked to: either the status of the third countries in which the minority members reside, or to the status of the population in the motherland.

[1] This is the case in Germany, Bulgaria and Romania, among others.

Third country complications mainly arise when the new citizenship is not the only citizenship of the minority member. Except in the case of stateless persons (relevant only in Estonia)[2] even members of a minority normally have the citizenship of their country of residence. Considering the worldwide attempt to decrease the number of people with multiple citizenships, most countries have provisions prohibiting dual citizenship or require the renunciation of the old citizenship when a new one is acquired[3]. Moreover, in some countries only nationals can own or inherit land.[4] This creates another obstacle over and above the prohibition of dual citizenship, but it is widespread and difficult to regulate in the absence of close cooperation between the countries concerned. These obstacles to dual citizenship have been relevant for the case in question (the Greek minority in Albania) but also, for example, for the Bulgarian or German minorities in the former Soviet Union, who could not acquire citizenship of their motherland unless they renounced the citizenship of their country of residence.[5]

The second complication resulting from the granting of citizenship to minority members who reside in a third country lies in the attitude of the population in the

[2] After regaining independence in 1991, Estonia recognised citizenship of everybody who was a citizen prior to the Soviet occupation of 1940 or descended from such a citizen but did not grant any new citizenship authomatically. This affected people who have arrived in the country after 1940, the majority of whom were ethnic Russians. Knowledge of Estonian language and history were set as conditions for naturalization. As a result, according to Estonian Ministry of Foreign Affairs, in 1992 32% of residents lacked any form of citizenship. For a detailed analysis of the citizenship rules in Estonia, see P. JARVE, "Estonian citizenship: Between ethnic preferences and democratic obligations" in R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) Citizenship Policies in the New Europe, Amsterdam University Press, 2009.

[3] See among others ALFRED M. BOLL, Multiple Nationality and International Law, Martinus Nijhoff Publishers, Leiden, 2007, EVA ØSTERGAARD-NIELSEN, Dual Citizenship: Policy Trends and Political Participation in EU Member States, European Parliament, Policy Department C – Citizens' Rights and Constitutional Affairs, Brussels, 2008, RAINER BAUBÖCK, EVA ERSBØLL, KEES GROENENDIJK AND HARALD WALDRAUCH (EDS.) Acquisition and Loss of Nationality. Policies and Trends in 15 European States. 2 volumes, Amsterdam University Press, September 2006. Data and additional analyses are available at: www.imiscoe.org/natac.

[4] This has been the case especially in post-communist countries, where the issue of the ownership of agricultural land by foreigners has been a very contentious issue for a long time. See for further details, LYNN M. TESSER, "East-Central Europe's new security concern: foreign land ownership", Communist and Post-Communist Studies, Volume 37, Issue 2, June 2004, Pages 213-239 and JOHAN F.M. SWINNEN AND SCOTT ROZELLE , From Marx and Mao to the Market: The Economics and Politics of Agricultural Transition, Oxford University Press, Oxford, 2006.

[5] There is of course a large body of literature on many different aspects of dual citizenship; however, for the purposes of this work only the de facto limitations on dual citizenship in Eastern Europe are relevant. On this aspect, see LOWELL BARRINGTON, "The Domestic and International Consequences of Citizenship in the Soviet Successor States" Europe-Asia Studies, Vol. 47, No. 5 (Jul., 1995), pp. 731-763. The issue of double citizenship has also been a constant source of problems for the large Turkish minority living in Germany.

motherland. The importance of this consideration grew noticeably after the attempt in Hungary to institute a fast-track citizenship procedure for Hungarian minorities in neighbouring countries. The referendum held on this issue failed, thereby forcing the government to search for alternative forms of regulation to ensure the link with the motherland upon accession to the EU.[6]

In the face of such challenges, the alternative to granting wholesale citizenship is often the creation of some kind of document (residence permit, 'ethnic card' or a special multi-entry visa) to ensure that contacts with the motherland are maintained.[7] Such an approach has obvious shortcomings, especially compared to the citizenship option. It grants the right of entry and possibly some access to the labour market but it does not provide the full protection of citizenship. Still, for the purposes of studying the right of entry and the possibilities of flexible application to ensure contacts between Schengen and non-Schengen countries, consideration of the Greek case can provide certain insights into the way in which the Schengen *acquis* on visas and entry conditions can be applied, while ensuring the unproblematic entry of minority members.

[6] The situation of Hungary, its 'Status Law' and the measures it took to ensure the access to its territory for the Hungarian minority members in neighbouring countries is addressed in detail in Chapter 7. In brief, on 5 December 2004, Hungary held a referendum on whether it should offer Hungarian citizenship to Hungarians living outside the borders of the Hungarian state. The novelty of the proposal was not the introduction of the possibility for dual citizenship (as it already existed) but in the waiving of all residency requirements as conditions for obtaining a Hungarian second citizenship. The text of the referendum question was as follows: "Do you think that Parliament should pass a law allowing Hungarian citizenship with preferential naturalization to be granted to those, at their request, who claim to have Hungarian nationality, do not live in Hungary and are not Hungarian citizens, and who prove their Hungarian nationality by means of a "Hungarian Identity Card" issued pursuant to Article 19 of Act LXII of 2001 or in another way to be determined by the law which is to be passed?". Ultimately the referendum failed due to the low participation – 63.33 per cent of the eligible voters stayed away from the referendum. The results among those participating were 51.57 per cent in favour of the reform and 48.43 per cent against. For the most recent analysis of the issue, see M. KOVACS AND J. TOTH, " Kin-state responsibility and ethnic citizenship: The Hungarian case" in " in R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) Citizenship Policies in the New Europe, Amsterdam University Press, 2009

[7] See, for example, the so-called Hungarian Certificate (Magyar Igazolvány), issued by Hungary on the basis of the "Status Law" of 2001 or the Card of the Pole (Karta Polaka) issued by Poland since 2008. Both cases are discussed in detail in Chapter 7.

2. The Greek minority in Albania: Geographic and historical background

Albania and Greece share a border of 282 km,[8] leaving a Greek minority in south-east Albania and an Albanian minority in the west of Greece. There is no agreement on the exact number of Greeks living in Albania. According to the official Albanian census of 1989,[9] they number 3% of the total Albanian population, while Greek sources[10] refer to as many as 12%, thus bringing the total number of Greeks in Albania to somewhere between 60,000 and 400,000.

The presence of the Greek-speaking minority on Albanian territory has led to recurring problems with the right to education in Greek, the right of association, the establishment of political parties, etc.; disputes that have been documented by the media, human rights protection organizations and scholars.[11] The focus here is on the possibilities of the Greek minority to maintain contact with the motherland and to travel freely from their country of residence to their country of ethnic belonging. The Greek minority is referred to in Albania as a "national minority", unlike some other Albanian minority groups who are referred to as "linguistic minorities."[12]

The Greek minority members who only hold Albanian citizenship are required to meet the criteria for any third country national for the purposes of entry. Since

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[8] Central Intelligence Agency, *The World Factbook*, available at www.cia.gov. See also DE RAPPER, "The Greek-Albanian border and its impact on local populations", *Cahiers Parisiens*, n. 3, (2007), pp. 566-575. See also: Minority Rights Group International, "World Directory of Minorities and Indigenous Peoples - Albania: Greeks" (2008), available at: http://www.unhcr.org/refworld/docid/49749d6531.html

[9] The last census in Albania was in 2001, but matters like ethnicity, religion and language were not included, see Council of Europe, COMPENDIUM: Cultural Policies and Trends in Europe: http://www.culturalpolicies.net/web/albania.php?aid=421); and The Census Online: Internet Census Resources for Eastern Europe and the Former Soviet Union, Michigan State University Libraries, available at: http://guides.lib.msu.edu/page.phtml?page_id=1297

[10] See for example, "Greek-Albanian relations overview", *Greece Now*, 2001, available at http://greecenow.criticalpublics.com/POLITICS/SouthEastEurope/greekalbanianrelations.stm.

[11] See for example, "Albania: The Greek Minority", *Human Rights Watch*, 1 February 1995, available at: http://www.unhcr.org/refworld/docid/3ae6a7e58.html.

[12] Albania recognises three national minorities (Greek, Macedonian and Serbian-Montenegrin) and two ethno-linguistic minorities (Aromanian and Roma). See Albania 2007 Progress Report, SEC (2007) 1429, 6.11.2007. The difference between national and ethno-linguistic minorities is that Albania is bound to fulfil certain commitments towards national minorities under the Council of Europe Framework Convention for the Protection of National Minorities. For further details see also the OSCE Report on Albania, from www.osce.org/publications/hcnm, Greek Helsinki Committee, Report on the completion of a project "On the status of the minorities in the Republic of Albania", available at: http://www.southeasteurope.org/documents/0009albminorities.pdf.

Albania has always[13] been on the EU's black list it follows that, in principle, even members of the Greek minority in Albania have to obtain a visa in order to visit Greece.

Under these circumstances, faced with the difficulty of providing access to its territory through citizenship, Greece developed a new document to facilitate the movement of Greeks from Albania to Greece; a special type of residence permit. Official data concerning the number of these permits is not publicly available, but various estimates put it at 80,000.[14]

This happened at a time when, as with other southern Member States, Greece experienced an increase in immigration during the 1990s. A 2001 census recorded the number of residents without Greek citizenship as 672,000, which grew by 2004 to 940,000 (9% of the population) of which about 100,000 were ethnic Greeks.[15]

Migrant Greeks from Albania: Official Albanian statistics put the number of ethnic Greeks at approximately 60,000, while, as mentioned above, various Greek sources[16] claim that 200,000 – 400,000 ethnic Greeks occupy the regions of southern Albania. Greece distinguishes ethnic Greeks with an Albanian passport from other foreign nationals. Only ethnic Greeks from Albania can acquire a special identity card, which also serves as an unrestricted work permit.

Unfortunately, there is no official data available on the number of Albanians who acquired Greek citizenship, because these data are considered as sensitive to national security and are thus confidential.[17]

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[13] For the whole period since the creation of the first Schengen black list.

[14] Data and definitions from THEODORIDES AND DIMITRAKOPOULOS, *Analytical Report on Legislation*, RAXEN National Focal Point Greece, Antigone, Information and Documentation Centre, (Athens and Vienna, 2004). The official justification for this secrecy is 'national security'. The Greek government apparently does not want the Albanian government to know how many of its citizens have opted for this special document.

[15] APOSTOLATOU, "Immigrant and immigration policy-making: A review of the literature of the Greek Case", *IMISCOE Working Paper*, Country Report, WP 11, available at International Migration, Integration and Social Cohesions, http://www.imiscoe.org/publications/workingpapers/.

[16] See for example, "Greek-Albanian relations overview", op. cit.

[17] M. BALDWIN-EDWARDS, *National Analytical Study on Racist Violence and Crime*, RAXEN National Focal Point Greece, Antigone, Information and Documentation Centre, (Athens and Vienna, (2004), available at http://fra.europa.eu/fraWebsite/attachments/CS-RV-NR-EL.pdf. In reality, the underlying

3. The national legislation

3.1. Background

In the literature dedicated to citizenship and immigration in Greece, there are several terms that need definition before one can proceed with the analysis of the legal texts.[18] The main distinction is based on the term **genos** (descent) and was transferred from "a key element of Greekness"[19] to a legal definition distinguishing **homogeneis** (literally, "people of the same lineage") who are considered Greek regardless of their actual citizenship and **allogeneis** (literally, "people of a different lineage") who are considered non-Greek even if they possess Greek citizenship. The **homogeneis** group is further divided in two main groups.

Repatriated ethnic Greeks (palinnostountes homogeneis) are residents of the New Independent States of the former Soviet Union of Greek ethnic descent, who have the right to apply for Greek citizenship if their nationality cannot be established by the procedures laid down in the Ankara and Lausanne Treaties[20]. Citizenship is granted

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issue of ethnicity is always problematic considering for example the cases of mixed marriages and the difficulties of documenting ethnicity in countries with poor public administrations.

[18] The issue of the ethnic Greeks from Albania (but also from other parts of the world and especially the former Soviet Union) has been subject to scholarly interest from three different perspectives. One of the aspects is linked to the study of the Greek ethnicity, or "Greekness" and the way it has been linked to the motherland through political and legal measures. Another approach looks at the issues through the prism of immigration, analyzing the political and legal rationale for creating favourable conditions for immigration for the ethnic Greeks mainly from Albania or the ex-USSR. The third line of study focuses on the problem through the prism of citizenship studies, comparing the conditions offered to immigrants and to the various categories of ethnic Greeks.

[19] K. TSITSELIKIS, "Citizenship in Greece: Present challenges for future changes", *University of Macedonia*, Thessaloniki, draft available at: http://www.antigone.gr/project_deliverables/Citizenship_in_Greece___Present_challenges_for_future_changes.doc.

[20] The Lausanne Treaty was signed on 24 July 1923 between the British Empire, France, Italy, Japan, Greece, Romania and the Kingdom of Serbs, Croats and Slovenes on one side and Turkey on the other. The Treaty replaced the Treaty of Sevres of 1920 and settled issues of borders, the Turkish Straits, trade and various agreements. Its Section II and Articles 30 to 36 determine the rules on nationality of the population on the territories which now belonged to a different state. The Treaty also contains provisions on minority protection. However, those came after minoroties populations were already exchanged based on an agreement of January 1923 for the Exchange of Greek and Turkish Populations, which foresaw compulsory transfer of population. All Turkish nationals of the Greek Orthodox religion established on Turkish territory (other than Constantinopole) and all Greek nationals of Muslim religion established on Greek territory (other than the newly acquired region of Western Thrace) were to be forcibly exchanged. The ensuing loss of property in this process was later confirmed by the Ankara Treaty of 1930. For details see also M. BALDWIN-EDWARDS, "Migration between Greece and Turkey: from the 'Exchange of Populations' to the non-recognition of borders", SEER SouthEast

on the findings of a special committee appointed jointly by the Minister of Interior and the Foreign Minister, on the basis of an interview and examination of "any information submitted thereby providing the said capacity", i.e. Greek ethnic descent.[21]

Migrant ethnic Greeks (homogeneis) are Albanian citizens of ethnic Greek descent. They are entitled to a residence permit of up to ten years' duration, of a uniform format in accordance with Regulation 1030/2002/EC, as well as to the special homogeneis identity card, of equal duration. These are issued by the competent Aliens' Department of the Greek Police, after a procedure involving an interview before a three-member special committee and the examination of any additional evidence that can prove Greek descent.[22]

3.2. Reforms after the collapse of the Iron Curtain

The collapse of communism in Eastern Europe led to an influx of immigrants from the neighbouring countries (mainly Albania), which in turn led to the need to reform the regulations of entry, residence and other immigration-related issues by replacing an old law from 1929, albeit with numerous amendments. Between the two census of 1991 and 2001, the resident population with a foreign citizenship increased by about 600.000, equivalent to about 6% of the total population. Almost two thirds of this increase is accounted for by Albanian citizens and most of the remainder comprises citizens from the former Soviet Union.[23] This dramatic growth in immigration had a profound influence on the policy regarding citizenship and residency.

Europe Review for Labour and Social Affairs (SEER SouthEast Europe Review for Labour and Social Affairs), issue: 03 / 2006, pages: 115-122

[21] Article 15(2), Law No. 3284 (Government Gazette A 217/10.11.2004, p.5941 – 5947) on the ratification of the Code of Greek Citizenship, as replaced by Article 1 of Presidential Decree 92/2006 (Government Gazette A 95/2006), available at: http://www.ypes.gr/el/Foreigner/Laws/

[22] Greece, Joint Ministerial Decision n° 4000/3/10 δ'/2005 (Government Gazette B 646- 13.5.2005)-A French version of the earlier 1998 Joint Ministerial Decision on the *Conditions, Duration and Procedure for the Delivery of a Special Identity Card to Albanian citizens of Greek origin* (Official Gazette No234 –B, 15 April 1998). Version in French is available in: European Commission for Democracy through Law (Venice Commission), *Preferential Treatment of National Minorities by their Kin-State: Collection of Laws*, Strasbourg, 15 October 2001, available at:

http://www.venice.coe.int/docs/2001/CDL(2001)096-e.pdf.

[23] K. Tsitselikis, "Citizenship in Greece: Present challenges for future changes", op. cit.

A new law was adopted in 1991, the Immigration Law 1975/1991, which regulated the "*entry and exit, sojourn, employment, expulsion of aliens, determination of aliens status and other provisions*".

Another law was adopted in 2001, dealing with the "*entry and residence of aliens on Greek territory; the acquisition of Greek citizenship by naturalization and other provisions*".

The issue of naturalization was once again addressed in the new Code of Greek Citizenship, adopted in 2004; the relevant provisions of which replaced the preceding legislation. In order to differentiate the criteria valid for foreigners applying for naturalization from those valid for applicants of Greek origin, the general rules will be explored briefly below.

3.3. Attribution of Greek citizenship

The general procedure for acquiring Greek citizenship through naturalization is a long, expensive and complex process stipulated by the Articles 5-13 of law No. 3284/2004 on the ratification of the Code of Greek Citizenship (hereinafter Code of Greek Citizenship). Applications take several years to be reviewed and apparently very few[24] are approved.

In order to be eligible for Greek citizenship through naturalization all foreigners (EU and non-EU citizens) must be over 18 and have no criminal record.[25] Based on law 3284/2004, applicants also have to fulfil a number of statutory requirements, including adequate knowledge of the Greek language, history and culture, as well as a total of 10 years' residency in Greece in the 12 years preceding the date of the application. The only exception to the residency requirement (apart from foreigners without nationality or refugees) is for foreigners who were born and raised in Greece, as well as those who are married to Greeks and have children with Greek spouses.

[24] Public authorities do not release data on naturalization and citizenship acquisition, especially concerning ethnic Greeks.

[25] Also no pending judgements for deportations against them.

The application for Greek citizenship through naturalization is submitted to the applicant's municipality, accompanied by the following documents:

- A declaration of naturalization signed in the presence of the mayor and two witnesses (Greek citizens);
- A photocopy of the applicant's passport or valid travel document. A translation is required if the information on this document is not written in Latin characters;
- A photocopy of the applicant's residence permit;
- A photocopy of the applicant's birth certificate;[26]
- A photocopy of the applicant's most recent income tax return;
- A non-refundable processing fee of € 1,470.

The last condition obviously represents a serious obstacle for applicants coming from poor countries.

The application and all the required documents are examined by the local prefecture and forwarded for approval to the agency of the Region competent for nationality matters. If the application is approved, officials at the regional office request a copy of the applicant's Type A criminal record certificate, a certificate of non-deportation and any other information deemed useful. The application is then forwarded to the Interior Ministry, where officials (Naturalization Committee) hold a personal interview with the applicant to assess his/her character and profiency in the Greek language. If the applicant fails to appear for interview, his/her absence is only justified on grounds of force majeure. If the application is approved, the decision is published in the Government Gazette and the applicant must take an oath of allegiance within one year.[27] If the application is rejected, it is possible to re-apply after one year.

Non-nationals of Greek descent who reside abroad may also acquire Greek citizenship. They must submit an application to their local Greek consular office with the following documents:

[26] This is not required for refugees.

[27] "I swear to be true to my homeland, to obey the constitution and the laws of this country and to consciously fulfill my duties as a Greek citizen."

- A declaration of naturalization signed in the presence of the consul and two Greek citizens who serve as witnesses;
- A Type A criminal record certificate issued by authorities in his/her country of residence.
- A copy of passport or other travel document
- A birth certificate.

The application is then processed by the Interior Ministry.

3.4. Special rules for ethnic Greeks

Various rules exist to regulate the position of ethnic Greeks who are exclusively linked to two geographic regions – the former Soviet Union and Albania. Ethnic Greeks are in general treated separately and differently by law and several legal provisions facilitate not only their acquisition of Greek citizenship but also the availability of special identity cards and further social and educational rights. However, as will become clear later, the Greek authorities de facto tried to discourage Greeks from Albania from applying for citizenship.

In 1990, on the basis of a Joint Ministerial Decision by the Ministry of the Interior and the Ministry of Defense 24755/6-4-1990, repatriated Greeks could enroll in municipal registers and remain in Greece indefinitely without providing any further documentation other than proof of their ethnic descent.

In 1993, according to Law 2130/1993 the concept of 'repatriation' became a legal term and ethnic Greeks were distinguished from other foreign nationals in the acquisition of Greek citizenship by a special rapid process.

These rules were supplemented by Law 2790 of 2000 and Ministerial Decision 4864/8/8-y/2000, which offered special rights, support structures and another distinct procedure for the rapid granting of Greek citizenship to ethnic Greeks from the former Soviet Union. Law 2790/2000[28] regulated the repatriation of ethnic Greeks, citizens of the former Soviet Union to Greece, the conditions for the acquisition of Greek

[28] Greece, Law No 2790/2000, op.cit.

citizenship and special provisions for their social integration. Subsequently, the new Code of Greek Citizenship replaced and largely repealed the provisions of this law. According to this law a clear distinction is made between ethnic Greeks and others concerning the procedures for naturalization.

According to Article 15 of the Code of Greek Citizenship, an ethnic Greek may submit an application to the Greek Consulate in the country of residence. A passport, birth certificate, certificate of family status, and any other official document proving Greek descent are required. A special three-member committee examines the documents, interviews the applicant and reports to the head of the Consulate who then forwards the report to the General Secretary of the Region of the future residence of the applicant. On the basis of the report, and a second report by a special regional committee that re-examines all documents and testimonies verifying the Greek descent of the applicant, the General Secretary decides whether to grant citizenship. If all is in order, the decision is published in the Government Gazette and the applicant acquires Greek citizenship. Within one year the applicant must take an oath of allegiance before the Greek Consul.

The key provision of the law of 2000 for the present study, (see paragraph 11 of Article 1, which has expressly remained in force according to the Code of Greek Citizenship), is the following: in the case that, for a person of Greek origin coming from the former Soviet Union, the acquisition of Greek citizenship entails, in accordance with the domestic legislation of their country of origin, the loss of the nationality of the latter country, or this repatriate does not wish to apply for Greek citizenship, or this person has already applied and is expecting the decision of the General Secretary of the Region Greek authorities may provide him/her, as well as his/her minors, with a “Special Identity Card”. Spouses of Special Identity holders automatically receive residence and work permits. For the acquisition of this Card, an interview as well as any supporting evidence is required. Moreover, by decision of the Interior Minister, special committees may review all documents concerning the acquisition either of Greek citizenship or the “Special Identity Card”. The Interior Ministry is the competent authority for the planning and implementation of all governmental policies related to the reception, social support and incorporation of repatriated persons in Greek society. What is interesting in this case is that it is

possible to apply for the card even if a person does not reside in Greece. This is possible for the ethnic Greeks from the former Soviet Union but not for the ethnic Greeks from Albania, however. Ethnic Greeks (homogeneis) from the former Soviet Union are the recipients of special integration measures and rapid naturalization procedures; ethnic Greeks from elsewhere are generally denied integration assistance and are required to apply through the normal procedures for Greek nationality.

Ethnic Greeks from Albania had de facto great difficulties acquiring Greek nationality until 2006. Their applications were not dealt with for years, with the result that few of them were able to acquire Greek citizenship. Given this situation, it was more important that their position be regulated by Ministerial Decree No. 4000/3/10-δ/2005 about "residence and work of Albanian citizens of Greek origin". The preceding decision on the same subject matter, Ministerial Decree No. 4000/3/10-δ/1998[29] defined as one of its considerations: "*The need to assure equal prerequisites for employment of the Albanian citizens of Greek origin, residing in our country, in relation to Greek citizens, aiming at the regular functioning of the labour market*."[30] Article 1 of the 2005 Decision that is now in force provides that the Albanian citizens of Greek origin residing in Greece, apart from the residence permit of up to ten years' duration, of a uniform format in accordance with Regulation 1030/2002/EC, a special homogeneis identity card valid for the same duration (i.e. up to 10 years) as that of the residence permit is given, by the police authorities, which handle foreign citizens' issues (Aliens' Departments of the Greek Police). The card is renewable and can also be issued to spouses and children of homogeneis. It is important to note at this point that contrary to the situation of the ethnic Greeks from the former Soviet Union, the ethnic Greeks from Albania can only apply for the special identity card in Greece – which implies that they need to obtain a visa to enter Greece lawfully. The conditions under which the presence (or residence) in Greece are, however, not subject to any limitations or controls.

Article 2 of the Ministerial Decision provides that in order to obtain the special identity card, it is sufficient if the applicant presents a valid travel document from his

[29] Available in French on the website of the Venice Commission, "Legislation on Kin-minorities", available at http://www.venice.coe.int/docs/2001/CDL(2001)095-e.asp.

[30] See point 6 of the Ministerial Decision.

country of citizenship and a valid consular visa. In addition to these documents, it is necessary to prove the ethnic Greek origin of the applicant, both by means of official documents and a personal interview before a three-member committee, to which additional evidence proving Greek descent may be presented.

Once issued, the card provides its holder with the right to residence and work for the period of its validity and, as we will see in the next section, with free movement within the Schengen area due to the fact that this special identity card is always given together with a residence permit of the same duration.

Unfortunately, it is difficult to ascertain how many homogeneis cards have been issued so far. The number of both types of these special permits, respectively for ethnic Greeks from the former Soviet Union or Albania, is not published by the Ministry of Public Order for "reasons of national security".[31] The estimates are that since 2000 about 200,000 of these special identity cards have been issued to the two groups (2000 was also the year in which Greece became a full member of the Schengen group).

3.5. Greece's integration into Schengen[32]

The Schengen Convention was signed in 1990 and entered into force only on 26 March 1995. Greece was not part of the original group of signatory countries. It joined the group through an international agreement. Initially, as of December 1991, Greece was considered as an observer, and then signed an accession agreement in November 1992. Meanwhile, new legislation dealing with aliens was adopted with the 1991[33] Aliens, Immigration and Refugees Act, an act that provided for the legal alignment as regards some of the Schengen provisions, especially those dealing with

[31] Unfortunately no further explanations are being given as to why these data should have an impact on national security. For statistical data on immigrants in Greece, see "An analytical study of available data and recommendations for conformity with European Union standards", Final Report, *Migration Policy Institute*, Greece, 15 November 2004, pp. 2-3, available at http://www.mmo.gr/pdf/general/IMEPO_Final_Report_English.pdf.

[32] For a detailed analysis of the Greek implementation of the Schengen agreement and the perceptions in society about it, see SAMATAS, "Greece in 'Schengenland': blessing or anathema for citizens' and foreigners' rights?", *Journal of Ethnic and Migration Studies*, Vol. 29, No.1, (2003), pp. 141-156.

[33] Greece, Law No 1975/1991 on entry, exit, sojourn, employment, and removal of foreigners, recognition procedure of refugees and other stimulations.

grounds for issuing and refusing a visa, setting up "anti-clandestine immigration patrols" and lists of undesirable aliens.[34]

Despite the initial enthusiasm of Greece at joining the Schengen group of states – driven probably by the importance of tourism to the country's economy – it took five years to ratify the Treaty.[35] This finally happened on 11 June 1997, following the adoption of Bill 2472/97 on 13 March 1997 as a legal precondition for the entry of Greece into the Schengen Agreement. Only once these legal pre-conditions were fulfilled, could the peer review performed on each new Schengen state begin. This peer review took over two years, mainly due to problems related to the implementation of the Schengen *acquis* and the apprehension of the other Schengen members about whether Greece would be able to patrol its maritime border properly. Greece became a full member of Schengen on 26 March 2000 when border controls were lifted, ten years after the entry into force of the Schengen agreement itself.

4. Flexibility within the framework of Schengen

Given the political aim of Greece to facilitate contact with the national minority living in a neighbouring country, a solution might have been the more liberal granting of visas. This seems to have happened in the case of Greece. Greek consulates in Albania issue about 60 to 70 thousand visas annually (two thirds of which are issued in the two Greek consulates in the border region).[36] This number is higher than the official Albanian figure for the size of the Greek minority (60 thousand as mentioned

[34] SAMATAS, op. cit.

[35] The delay was due to internal party disagreements. The Schengen Accession Agreement was signed by the government of the New Democracy party. The subsequent PASOK governments were reluctant to ratify the Agreement, fearing that national sovereignty would be diluted and personal privacy laws would be violated by the SIS. The ratification came after the Greek-Turkish crisis of January 1996 when the two countries came close to a military confrontation over contested Greek sovereign rights in the Aegean Sea. At that point in time, the main government argument in favour of Schangen was that it would first shield Greece's borders against Turkish territorial claims in the Aegean, as it would lead to a de facto recognition of all Greek borders as external borders of the European Union. The role of Schengen as "necessary crime prevention apparatus" took a secondary place. For more details on the political debates, arguments and press coverage see, Samatas, op.cit.

[36] The case of Greece also illustrates other aspects of the use and perhaps misuse of flexibility under Schengen. For example, Greece issues close to 100 thousand visas annually with a limited territorial validity (VTL). This amounts to almost one half of the total of around 200,000 issued by all Schengen member countries. Almost all of the VTL visas issued by Albania came from the two Greek consulates in the Former Yugoslav Republic of Macedonia. Latest available data for 2008, see General Secretariat of the Council, DG H 1A 8215/08 available on http://register.consilium.europa.eu/pdf/en/08/st08/st08215.en08.pdf.

above) and would still constitute a sizeable proportion of the Greek minority if Greek sources are used, which put this minority at about 400 thousand. About one half of the visas issued by the Greek consulates in Albania were longer-term national visas. This is highly unusual among all other member countries, where Schengen visas outnumber national ones by about 5-10 to 1. Thus, it is apparent that Greece was liberally granting longer-term (national) visas. But this was perceived as not being sufficient. These visas did not include a work permit, although clearly the purpose of the migration in most cases was to find a job in Greece in order to support family at home.

The importance of the special residence cards issued by the Greek authorities has a wider European significance as far as the free movement of third country nationals is concerned. While the conditions and procedures under which residence rights are granted still fall within the competence of each Member State, the mere fact of holding a residence permit from one Member State immediately grants a right towards the other Member States, namely the right of entry under Schengen rules. In effect this is a strong example of mutual recognition principle.

With the first provisions of the Schengen *acquis* related to entry conditions, it was stated that holding a residence permit from a Schengen state could replace the need for a visa for a third-country national.[37] Thus, for that category of persons, entry into the common space is possible on simple presentation of their travel document (usually passport) and their residence permit/card. Having this rule in place explains why the granting of residence permits to minority members in third countries who would normally be treated as aliens under national legislation, could solve the problem of access to the motherland, whenever strict entry rules are applied due to the communitarization of visa rules[38].

One might argue that the more direct approach of granting citizenship to the group in question might be preferable. To start with, citizenship gives access to a much wider

[37] Article 5(3) of the Schengen Implementing Convention, O.J. 2000, L 239, p. 19 and Annex IV "List of documents entitling holders to entry without a visa" of the Common Consular Instructions, O.J. 2000, L 239, p. 356.

[38] The widespread application of this possibility in the case of Greece could be considered as against the spirit of the Schengen system; however, it was accepted by the other Schengen States.

range of rights than a residence permit. Even when taking into consideration the types of permit developed in Greece that could amount to quasi-citizenship,[39] including the unlimited right to work, social payments, acquisition of property limited to nationals but open to those with the same ethnic background etc., it still falls short of political rights, such as participation in national elections.

Finally, citizenship would by its nature be unlimited in time, which cannot be said for residence permits, which in their particular remit are directed at ethnic Greeks and are still limited in time.

Granting citizenship to minority members abroad cannot always be carried out on a massive scale, however. One key legal obstacle is the prohibition of dual citizenship in many countries. Whenever such a prohibition applies, members of the ethnic minority are often reluctant to acquire the kin-state (here Greek) citizenship. The ensuing loss of citizenship of their country of residence (Albania) could have a negative effect on their property rights there as well as on their possibility to own or inherit land. However, it might also be the case that dual citizenship is actively discouraged by the motherland, as it could lead to a mass exodus and thus decrease minority numbers across the border.

In the particular case under discussion here, for many years ethnic Greeks from Albania have been seeking Greek citizenship, but successive governments have blocked this demand, worried that any such move might compromise the rights of the minority group in the neighbouring country.[40] On 8 November 2006, the Greek Interior Minister declared: "Following talks (with Albania) and a constitutional amendment (in that country) we can now begin awarding citizenship". The naturalization will be open to ethnic Greeks from Albania, provided they have the special homogeneis identity card certifying their status. According to the Ministry of Interior, some 30,000 minority Greeks from Albania have already applied for

[39] BAUBÖCK, ERSBOL, GROENENDIJK AND WALDRAUCH (eds), *Acquisition and loss of nationality, policies and trends in 15 European states; Summary and Recommendations*, Institute for European Integration Research, Austrian Academy of Sciences, (Vienna, 2006).

[40] "Greek Minority in Albania: 200,000 Ethnic Greeks from Albania to be Naturalized", *UNPO – Unrepresented Nations and Peoples Organization*, 9 November 2006, available at: http://www.unpo.org/content/view/5796/236/.

naturalization, while around 200,000 are believed to possess the required identity card. The Albanian Prime Minister Sali Berisha declared that "Greek Government's decision for granting double citizenship is acceptable for Albania."[41]

A significant problem with the present residence permits issued lies in the concept of the residence permit as such. In principle, a residence permit is issued only when a person does in fact have an address and residence on the territory of the issuing state.[42]

4.1. The residence permit as visa replacement

In the Schengen *acquis*. Article 5 of the Schengen Convention defines the conditions an alien has to meet to be allowed entry onto the common territory. As a rule, Article 5(1) requires the alien to be in possession of a valid visa (and obviously a valid passport), if required, depending on his country of origin. However, Article 5(3) of the Schengen Convention opens the possibility for

> aliens who hold residence permits or re-entry visas issued by one of the contracting parties, or where required, both documents, shall be authorized entry for transit purposes, unless their names are on the national list of alerts of the contracting party whose external borders they are seeking to cross.

The wording of Article 5(3) gives the impression that the use of residence permits of one of the Schengen countries grants access to the Schengen territory only for the purposes of transit. However, Article 21 (1) of the Schengen Convention also provides for the right of free movement on the Schengen territory for a period of up to three months for the holders of residence permits. The conditions for the exercise of that right are: fulfilment of three of the five entry conditions of Article 5 (1) of the Schengen Convention (valid travel document, necessary supporting documents and

[41] "Greek Minority in Albania: Prime Minister Approved Double Citizenship", *UNPO – Unrepresented Nations and Peoples' Organization*, 13 November 2006, available at: http://www.unpo.org/content/view/5812/236/.

[42] Moreover, it should be pointed out a more liberal approach to the issue of granting citizenship to foreign nationals in general, and not only to those specific groups of ethnic Greek descent and identity, is at the time of writing (end 2009) under official consideration: according to declarations made by the Greek Prime Minister, George Papandreou, all children born to migrants from now on will automatically acquire Greek citizenship. See Kathimerini newspaper, November 5, 2009 issue, available at: http://www.ekathimerini.com/4dcgi/_w_articles_politics_100004_05/11/2009_112154

not being considered a threat by the other Schengen states).[43] Thus, the combined application of Article 5 (3) and Article 21 (1) led to the adoption of an extremely clear text in the Common Manual. Point 6.2 of Part II of the Manual entitled "Aliens holding a residence permit issued by another Contracting party" holds that "aliens holding a residence permit issued by another Contracting party are exempt from the visa requirement for entering the territory of the other Contracting Parties". This text is to be found in the version of the Common Manual of 2002,[44] but it is impossible to determine when the text entered the Common Manual because the latter was classified until official publication of most of its text in 2002.

Following the Maastricht Treaty, a Joint Action 97/11/JHA of 16 December 1996 was adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning a uniform format for residence permits.[45] The Joint Action established a uniform format for residence permits for third country nationals. A residence permit is defined here as "any authorization issued by the authorities of a Member State allowing a third country national to stay legally on its territory…" The Joint Action does not apply to: visas, permits valid for no more than six months and permits issued pending examination of an application for a residence permit or for asylum. Nor does it apply to: members of the families of citizens of the Union exercising their right to free movement or nationals of Member States of the European Free Trade Association party to the Agreement on the European Economic Area, or members of their families exercising their right to free movement.

A special Decision of the Schengen Executive Committee of 15 December 1997 on the implementation of the joint action concerning a uniform format for residence permits[46] stated that the "*Schengen states shall endeavour to implement the joint action of 16 December 1996 concerning a uniform format for residence permits as*

[43] The requirements to hold a visa and not have an alert issued for the purposes of entry are waived in this case.

[44] O.J. 2002, C 313/02.

[45] O.J. 1997, L 7.

[46] The Schengen *acquis* - Decision of the Executive Committee of 15 December 1997 on the implementation of the Joint Action concerning a uniform format for residence permits (SCH/Com-ex (97) 34 rev.), (O.J. 2000, L 239, p. 187).

soon as possible, if necessary by phasing it in, before the end of the transitional period stipulated in the joint action."

The Common Manual[47] specified that

> a list for each country, of the documents recognized as valid for the crossing of external borders and of those which may bear a visa, in the case of aliens subject to the visa requirements, is set out in Annex 4, while a list of, and specimen residence permits and return visas, provided for under Article 5(3) of the Convention implementing the Schengen Agreement, are set out in Annex 11.[48]

And indeed already in the Common Manual, as well as in the Common Consular Instructions on visas for the diplomatic missions and consular posts,[49] a list of documents entitling holders to entry without a visa is included as an annex. And under the list of documents for Greece one can find the special cards issued to ethnic Greeks and especially "Special identity card for aliens of Greek descent (beige)". There is a clarification attached to the document stating that "this document is issued to Albanian nationals of Greek descent; it is valid for three years and the card is also issued to their spouses and descendants of Greek origin, regardless of nationality, provided there is official documentation of some kind to prove their family ties".

4.2. Secondary European legislation prior to the Border Code

In 2002 following the incorporation of the Schengen *acquis* into the Treaties, a new Regulation was adopted aimed at communitarizing the issues related to residence permits. Thus, a new Council Regulation No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals was adopted and replaced the Joint Action 97/11/JHA, and the measures adopted by the Council with a view to its application.

A regulation sets out the general characteristics of the uniform format, a copy of which is attached to the document. The uniform format can be used as a sticker or a

[47] O.J. 2002, C 313/02. The Common Manual as adopted by the Executive Committee established by the Convention implementing the Schengen agreement of 14 June 1985 was listed under reference SCH/Com-ex (99) 13 in annex A to Council Decision 1999/435/EC O.J. 1999, L 176, p.1.

[48] Common Manual, op. cit. p. 101.

[49] O.J. 2002, C 313/01. Common Manual.

stand-alone document. The regulation requires Member States to issue the uniform format for residence permits no later than one year after adopting the additional security measures. Authorization granted or other types of residence permit issued previously continue to be valid unless the Member States decide otherwise.

4.3. The present regulation under the Schengen Borders Code

In the Schengen Borders Code adopted in 2006[50] with the aim of codification of the rules governing the movement of persons, the issue of residence permits in the place of visas receives special treatment. Firstly, the definition of "residence permit" is taken from Article 1(2) of Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third country nationals.[51] This definition in turn is taken from Article 1 of the Schengen Convention, though to avoid all ambiguity it adds a provision that visas are not covered by the definition of "residence permit".

Paragraph 1 of Article 5 of the Schengen Borders Code takes over the uniform entry conditions provided for by Article 5(1) of the Schengen Convention. In addition, a new condition is introduced, of not representing a threat to public health. However, the entry condition related to visas is altered and now includes "being in possession of a valid visa … except where they hold a valid residence permit". In addition, third country nationals who do not fulfil all the conditions of Article 5 (1) of the Schengen Borders Code can still be authorized entry for transit purposes unless they are included in the national alert list of the Member States whose external borders they are seeking to cross.

The principle found in paragraph 4 is not explicit in Article 5 of the Schengen Convention; it flows from Article 21 (which provides for the possibility for the holder of a residence document issued in a Schengen state to travel to other Schengen states for three months). It is also mentioned in the current point 6.2 of Part II of the Manual.

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[50] See Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2006, L 105/1.

[51] O.J. 2002, L 157, p.1.

Paragraph 5 takes over Article 5(3) of the Schengen Convention on the admission in transit of third-country nationals holding a residence permit or authorization or a re-entry visa issued by one of the Member States – even if they do not fulfil all the entry conditions – unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross.

Paragraph 7 specifies that the residence permits and authorizations referred to in paragraphs 4 and 5 cover all residence permits issued by the Member States (on or after 12 August 2004) according to the uniform format laid down by the Regulation (EC) No 1030/2002, which establishes a uniform format for residence documents, and all other residence permits and authorizations and return visas referred to in Annex 4 of the Common Consular Instructions.

To sum up, the provision of Article 5 (1) of the Schengen Borders Code significantly clarifies the situation as regards the use of residence permits as a replacement of a visa. While under the previous regime of the Schengen Convention there were two legal texts and two rights guaranteeing the right of entry for transit (Art. 5 of the Schengen Convention) and the right of movement in the common territory for a period of three months, the new Schengen Borders Code clearly states that the holding of a residence permit is sufficient grounds for granting entry, regardless of the purpose of the transit – entry or stay for up to three months.

As far as transit is concerned, this time the rules on transit are not applicable in all cases of third-country nationals wishing to enter with a residence permit, but in cases where certain entry conditions in Article 5 are not met, there is still the possibility to authorize entry, for the purpose of transit, provided the person seeking to enter is not on the national alert list of the country whose border s/he wishes to cross.

As for the types of document recognized for the purposes of crossing, they remain valid in an annex to the Common Consular Instruction, and their format is regulated by the specific regulation, including certain biometric data.

5. Conclusions

The common visa policy was created as a flanking measure to the lifting of internal border controls. This was deemed necessary because of the lack of trust among Member States. This chapter examined a case in which the Schengen framework allowed one Member State to use a specific national legal measure which effectively facilitated access for a national minority living in a neighbouring country to its own territory.

There is no reliable data as to the number of special identity cards issued to the Albanian citizens of Greek descent but, as mentioned above; the generally estimated figure is around 200,000,[52] or about 2% of the population of Greece, which shows the importance for Greece of this measure.

Greece has communicated both types of special identity card in its list of documents entitling holders to entry without a visa.[53] Thus, all holders of the special identity cards have the possibility to enter Greece, or any other Schengen state, without the need to apply for a visa, although as Albanians, they would normally require a Schengen visa.

It is difficult to see what would prevent any other EU Member State, especially some of the 'new' ones with significant minorities in neighbouring countries, from using similar measures. In fact, this example was soon to be followed, with slight variations, by some of the new Member States that acceded to the EU in 2004 (see Chapter 7).

Only the format and the security and biometric features of (national) residence permits are harmonized but not the conditions under which they are issued. Thus, in this particular field, Member States have the freedom to apply their national priorities. A Member State can decide to issue either a special ID card or a special residence permit to minority members or persons of the same ethnic origin (as defined by the national legislation). The type of document just needs to be communicated to the European authorities to be included on the common list, and the problem of access to the motherland is solved.

[52] See Statistical data on immigrants in Greece, op. cit.

[53] Annex IV of the Common Consular Instruction, op. cit.

However, the practicality and sustainability of a widespread adoption of this approach is questionable. Among the 15 states that participated in the common list when it was incorporated in the Common Consular Instruction, Greece was the only[54] one to communicate the special residency permits it issued. Greece did not communicate one, but three different documents, depending on the country of origin of the ethnic Greeks entitled to this document. If other countries were to create a similar number of special documents, it would soon become rather difficult to maintain the common list

Although Greece reportedly issued hundreds of thousands of these special identity cards, there are no reports of them being misused on a large scale to enter other Schengen countries. One reason for this must be Greece's comparatively isolated position relative to the rest of the Schengen territory. But the real reason might be quite simply that Albanian Greeks looking for work preferred to stay legally in Greece (where they had access to social services, including free health care) rather than to migrate to other Schengen countries and stay there illegally. The language barrier might also have been another factor in limiting the impact for Greece's Schengen partners.

If this Greek 'experiment' had had a significant negative impact on other countries in terms of illegal migration or crime, there would have been pressure to establish harmonized rules for the issuance of ID cards. This was apparently not the case however, in the sense that there is no trace of such pressure from other countries in official documents. In the latest update of the Schengen Borders Code the Greek identity card is listed without comment.

[54] The key reason for this was that Greece was at the time the only Member State with significant minorities both in a neighbouring country sharing a common land border and also in other third countries (like the countries of the ex-USSR).

CHAPTER 7 – THE CENTRAL AND EASTERN EUROPEAN COUNTRIES AND THEIR DIFFICULTIES WITH SOVEREIGNTY TRANSFER ON VISAS

This chapter looks at how the Member States that joined the EU after the entry into force of the Amsterdam Treaty reacted to the requirement to transfer part of their sovereignty in the visa field.

The particular situation in which each individual accession country found itself due to historical links and geographical location had to be channelled through a common set of requirements within the negotiations for the membership process. In some instances, one could claim that the whole exercise amounted to transforming (not to say surrendering) one particular national identity to meet the requirements of a common European one.

As the transformation process took more than a decade to complete and was influenced by the gradual changes in this policy field within the European Union itself, the changes in the legal regulation and implementation in the candidate countries also developed gradually. Still, their accession to Schengen takes a clear three-step approach, which so far has only been completed for the countries that joined the EU in 2004, but is still ongoing for Bulgaria, Romania and Cyprus, which however, is in a very special situation.

Section 1 of this chapter offers a brief description of the legal framework for the accession process, which required compulsory Schengen integration as part of the *acquis*. The candidate countries thus had to accept that the various derogations, opt-outs and opt-ins of some of the old Member States were not available to them. Section 2 then analyzes in more detail the evolution of the accession negotiations in the area of visa policy, and Section 3 describes the legal context post EU membership, prior to the lifting of internal border controls. Section 4 turns to the situation after this step, i.e. after the new Member States became full Schengen members and documents the impact of Schengen membership on actual visa issuance. Section 5 then analyzes

the reasons for the difficulties and tensions that arose in this context. Section 6 concludes.

1. The starting point – compulsory Schengen integration

One fundamental aspect of the future enlargement of Schengen was regulated through the Schengen Protocol of the Amsterdam Treaty.[1] According to this Protocol, any state acceding to the European Union must accept the totality of Title IV EC on accession. No 'opt-outs' were to be permitted for the new Member States, following Article 8 of the Protocol integrating the Schengen *acquis* into the Framework of the European Union, which establishes that:

> For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all State candidates for admission.

This provision reflects mainly the general rule made in the last two enlargements negotiations that the candidate country has to accept the acquis communautaire in full. Once the Schengen acquis had been communitarised it became part of the acquis commaunitaire (see part 2.1 of Chapter 2). Thus the Schengen *acquis*, including the part dealing with the free movement of persons and visas in particular, needed to be accepted by the candidate countries without the possibility of the opt-outs, opt-ins or any other flexible arrangements that were available to 'older' Member States (in reality only the UK, Ireland and Denmark).

Moreover, no transition periods were foreseen (and none were granted) in this field. This is in sharp contrast to the internal market *acquis*, in which numerous (important) transition periods were granted (e.g. regarding free movement of workers or regarding the sale of agricultural land to foreign citizens). One reason for this rigidity was, of course, that the process of full Schengen membership already implies a transition period. However, the new Member States had to apply most of the Schengen *acquis* from day one of their membership and thus long before full Schengen membership was achieved, with the lifting of controls on internal borders.

[1] Protocol No 2 integrating the Schengen *acquis* into the framework of the European Union (1997).

1.1. The stages of accession to Schengen post-Amsterdam.

The Amsterdam Treaty not only communitarized visa policy by moving it from the third to the first pillar and integrated the Schengen *acquis* into the Treaty, but also obliged any future member of the EU to adopt the Schengen provisions as such without the possibility for negotiations of special derogations, of the type previously available to Portugal and Spain.[2] This requirement created the necessity for the development of a multi-step process to allow the full integration of the new Member States in the Union's "area without internal frontiers".

In practice, the multi-step approach turned out to consist of three distinct steps, which all new Member States had to take before enjoying the freedom of movement without passport control throughout the Schengen area. The first step was EU membership. By the date of accession, certain binding rules had to be put in place as part of the rules on visas, rules on external borders and the *acquis* on migration, asylum, police co-operation, customs co-operation and human rights legal instruments. Following EU accession, further legal and administrative preparation, and a separate Council Decision, the lifting of internal border controls is taking place, thereby completing the full integration into Schengen.

In terms of the legal consequences for national visa policy, each stage of integration involves a gradual surrender of sovereignty. In the pre-accession stage, a process of alignment of visa policy rules takes place, following the negotiating brief on justice and home affairs. At this stage, as the new legislation is adopted gradually and as its full application can be postponed as long as accession has not taken place, each candidate country still has the possibility to maintain certain rules that do not necessarily fall into line with EU requirements. The candidate country retains its freedom concerning many elements of visa policy e.g. the negative and positive visa lists, visa format, the visa information system and border traffic agreements with third states.

This freedom however, considerably diminishes after accession to the EU. First and foremost, by that date all parts of the Schengen *acquis* have to be transposed into

[2] See Chapter 4 of this thesis for details on the cases of Portugal and Spain.

national regulation, even though some of them will not yet have to be implemented. However, as long as the new Member States were not issuing Schengen visas, or formed part of the common information system, they continue to follow their national regulation as far as the issuing of visas is concerned, as well as the procedures and requirements for doing so. In practice these provisions mean that despite the fact that the new Member States' borders have been transformed into the external borders of the Union, and the fact that there are common rules on whom can be admitted to the territory, the new Member States themselves can still decide on a number of issues, for example, the procedures for issuing visas, as mentioned above. The security of the other Member States is not endangered as the controls on internal borders between new and old Member States are still maintained. Such a situation allows the new Member States to accommodate the special needs they have towards particular neighbours by applying their preferential conditions for issuing visas.

This national room for manoeuvre finishes with the date of full integration into Schengen. From this date onwards the new Member State will have to apply the common visa policy in full.

The remainder of this chapter analyzes how the different Schengen integration steps discussed above affect the problems the new Member States face in relation to the implementation of the Schengen *acquis* in general, and the visa part of it in particular.[3]

[3] For an overview of the challenges related to the enlargement of the area of freedom, security and justice, see, among others, ANDERSON AND APAP, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, Centre for European Policy Studies, (Brussels, 2002); J. APAP (ed.) *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Edward Elgar, (Cheltenham, 2004), J. MONAR, *Enlargement-related diversity in EU Justice and Home Affairs: Challenges, Dimensions and Management Instruments*, WRR – Scientific Council for Government Policy, (The Hague, 2000), APAP, "Transfer of Competence: Between Sovereignty and Supranational", in Anderson and Apap (eds), *Police and Justice Co-operation and the New European Borders*, Kluwer European Monographs, (Leiden, 2002), MITSILEGAS, "The implementation of the EU acquis on illegal immigration by the candidate countries of Central and Eastern Europe: challenges and contradictions", *Journal of Ethnic and Migration Studies*, vol. 28, n. 4, pp. 665-682 (2002), E. RIGO, "Implications of EU Enlargement for Border Management and Citizenship in Europe", *EUI Working Paper*, RSCAS n. 2005/21, (2005).

2. Negotiating membership – the period prior to accession

The accession process, its legal stages and legal consequences are discussed in detail in Chapter 2. To recall, it is based on the Copenhagen criteria established by the 1993 Copenhagen European Council.[4] Since at that time a common visa policy did not exist and even the Schengen agreement was not in force yet, obviously there were no special criteria related either to justice and home affairs in general, or to a visa policy in particular. The provisions on visa formed part of the so-called "third criteria" for membership, namely the ability to adopt and apply the *acquis*. Later when the negotiations for membership started, those provisions were part of negotiation Chapter 24 (for the countries of the 2004 and 2007 enlargements), dealing with the cooperation in the field of justice and home affairs.

As most of the candidate countries applied for membership before the Amsterdam Treaty was negotiated, let alone entered into force, the Opinion of the Commission on the application of membership (most of them dating back to 1997) referred to the Maastricht construction of the issue of visas. As the Commission states:

> The Justice and Home affairs cooperation acquis principally derives from the framework for cooperation set out in Title VI (Article K) of the Treaty of the European Union, "the third pillar", although certain "first pillar" (EC Treaty) provisions and legislative measures are also closely linked. The EU JHA framework primarily covers: asylum, control of external borders and immigration; customs cooperation and police cooperation against serious crime, including drug trafficking; and judicial cooperation on criminal and civil matters.

In the Opinion the Commission therefore seeks mainly to outline the existing regulation in each Member State, rather than make concrete demands and set requirements for their implementation. In effect, in terms of content in this particular field, the Opinions can be divided into two main groups. Those that do not foresee the possibility of achieving full implementation, even in the medium-term (e.g. Romania) and those that are more positive and underline concrete and achievable steps towards full implementation.

A detailed analysis of the regular reports dedicated to visa policy across the candidate countries for the whole seven year period (nine-year period for Bulgaria and

[4] Copenhagen European Council, "EU Presidency Conclusions", 21-22 June 1993, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

Romania) shows the influence exercised by the Union over the candidate countries.[5] Apart from the Commission Opinions on membership published in 1997, a time when the position of visa policy was still not legally confirmed, the reports in the following years tend to get more structured and progressively more detailed, as countries adopt more and more of the *acquis*. Already in 1998, visa policy forms a distinct part of the evaluation under the heading of Immigration/Border Controls and as of 2000, visa policy is an independent part in the Chapter dedicated to the co-operation in the field of justice and home affairs[6].

The requirements which the Commission puts forward follow the structure of the EU legislation in the visa field and are thus concentrated on five main elements: alignment to the EU visa black list; alignment to the EU visa white list; adoption of the visa format similar to that of the EU; the introduction of an electronic visa system and the abolition of the border traffic agreements previously in force.[7] All those elements will be studied in turn below in order to identify the issues that proved problematic in the accession process and for which country in particular the problem was more pronounced. To achieve this, the main criteria used would be the moment of full alignment achieved by each specific country. This moment in time proves to be important because it is the only liberty left to the countries under scrutiny. In this particular negotiation chapter (Chapter 24 on Justice and Home Affairs), there is no possibility for transition periods and thus in the year the negotiations are closed, all reports contain the key sentence "*Negotiations on this chapter have been provisionally closed.* [The candidate country] *has not requested any transitional arrangements in this field*". Thus, the only room for manoeuvre left to each country was to try to postpone the adoption and entry into force of certain measures up to the date of accession, the latest possible date for the implementation of national rules in this particular field.

[5] See Annex 7.2 to Chapter 7 for a comparative table on the evolution of visa requirements as criteria in the accession process (based on the regular reports from the Commission).

[6] See for example the 1998 Regular Report on Bulgaria and the 2000 Regular Report on Bulgaria, main elements of which are outlined in Annex 7.2.

[7] The border traffic agreements used to be included in the part of the reports dealing with border controls, rather than visas, but are included in this comparative study of the regular reports, as these kinds of agreements are linked to the recently adopted Regulation on local border traffic.

2.1. Alignment with the EU visa black list

As already demonstrated in Chapter 1, the visa lists, both black and white are considered the core of any visa policy, be it national or European. As a result, from the very beginning of the accession process, the Commission insisted on the full alignment with the EU black visa list at the latest at the date of accession. There were considerable differences among the candidate countries in the degree to which they wanted to keep their own national list as long as possible.

There are generally four groups that can be identified among all candidate countries. Group I comprises those countries such as Latvia and Estonia, which already in 1997 had adopted the EU black list.

Group II comprises those countries that delayed the introduction of visas to certain countries with which they had (and still have) special relations. However, these countries adopted the black list by 2001, when the new Visa Regulation[8] was adopted.

Table 7.1. Introduction of visa requirements for third countries (Group II)

Candidate country	**Year of introduction of visa requirements**	**Countries for which visa requirements were introduced**
Slovenia	1999	Macedonia, Turkey, Romania and Bulgaria[9]
Czech Republic	2000	Russia
Hungary	2001	Russia, Belarus and Ukraine
Slovakia	2001	Russia, Belarus and Ukraine
Bulgaria	2001	Russia, Belarus and Georgia

Group III comprises the candidate countries that postponed the introduction of visas to certain third countries (possibly due to their close relations with the country concerned), well beyond the provisional closure of the negotiations but before the actual accession date.

[8] Council Regulation 539/2001 listing the third countries whose nationals need visas when crossing the external borders and those who are exempt from that requirement, O.J. 2001, L 81.

[9] The introduction of visa requirements for Bulgaria and Romania caused serious political problems among the countries involved. Ultimately the EU had to intervene in the negotiation of interim rules until the revision of the Visa Regulation in 2001.

Table 7.2. Introduction of visa requirements for third countries (Group III)

Candidate country	**Year of introduction of visa requirements**	**Countries for which visa requirements were introduced**
Poland	October 2003	Russia, Belarus and Ukraine
Lithuania	2003	Russia, Belarus, Ukraine and Kaliningrad
Malta	2003	Turkey, Morocco, Tunisia, Egypt

Group IV comprises the countries that have used the ultimate possibility, reserved for countries with special historical or cultural links, namely the postponement of the full alignment to the negative visa list to the accession date. Only three such cases have been registered.

Table 7.3. Introduction of visa requirements for third countries (Group IV)

Candidate country	**Year of introduction of visa requirements**	**Countries for which visa requirements were introduced**
Malta	Upon accession	Libya
Bulgaria	Upon accession	Serbia and Montenegro and Macedonia
Romania	Upon accession	Moldova

2.2. Alignment with the EU white list

The granting of visa-free travel at first sight seems less politically sensitive than the introduction of visas; however, it raises some technical difficulties. Due to their historical developments and traditions, in 1997 most of the Central and Eastern European countries maintained visa requirements for a large number of countries, many of which were on the EU white list. Thus, as a result of the accession effort, all candidate countries had to negotiate visa exemption agreements with as many as 40 countries in less than a decade. Most of them, after four or five years of accession talks, still had 10 or 15 countries left before reaching the goal of full alignment. Some of the candidate states did not manage to complete this task even in the final year before accession – 2003.

2.3. Adoption of a new visa format

This and the following criteria were somewhat linked to the administrative capacity for reform in each individual country, rather than the speed with which they were able to adopt new legislation. Adoption of the new visa format did not raise any political questions as there were no disagreements on the substance and foreign policy priorities were not called into question either. Most of the countries met the requirements related to the common visa format early on in the negotiations (Slovenia even had it in place when the Commission Opinion was published in 1997).

2.4. Introduction of a computerised Visa Information System

As part of the accession process, each country had to introduce a centralized visa information system, linking the visa-issuing consulates to the central Consulate Directorate in the respective Ministry of Foreign Affairs. The build-up and the ultimate functioning of such a complex system took almost the whole accession period to complete, but as was the case with the previous requirement, the controversies surrounding this issue were mainly of an internal administrative nature and thus did not require the adoption of special rules.

2.5. Abolition of agreements on simplified border traffic

Another sensitive issue in the negotiating process were the agreements on simplified border traffic or on facilitated border crossing which existed between some candidate states and their Eastern neighbours. Most of the agreements were the result of large ethnic minorities living across the border, or communities being separated as a result of an intergovernmental agreement. Such agreements were yet another demonstration of the specificity of the soon to be EU external land border. Moreover, almost all candidates were involved in this type of agreement.

Table 7.4. Candidate countries having local border traffic agreements with neighbours and the year the agreements were abolished

Candidate country	**Year of abolition of bilateral agreement**	**Countries with which the agreement was in force**
Latvia	2000	Russia and Belarus – agreement on simplified border crossing procedure
Estonia	2000	Russia (especially Narva-Ivangograd) – facilitated border crossing formalities
Poland	2002	Russia, Belarus and Ukraine – agreement on simplified border traffic
Hungary	2003	Ukraine, Yugoslavia, Romania – facilitation of crossing by ethnic Hungarians from neighbouring countries
Slovakia	2001	Ukraine – simplified border crossing procedure for nationals with permanent residence in municipalities in the border areas

From the very start of the accession process, the Commission insisted that all those agreements not in compliance with the *acquis* had to be denounced as soon as possible. The effect was severe in some cases.

In order to avoid or mitigate this problem, especially for the border population, certain attempts were made to find a solution. This could be either a simplified procedure (as in the case of Poland) or the introduction of an entirely new type of document (as with the special identity card in Greece or the Hungarian certificate).

It is ironic, however, that in almost ten years EU policy on this particular issue has come full circle. In 1997, the Commission started pressing the candidate states to abolish agreements (in the case of Poland – more than ten years old) that preceded their accession negotiations. When those agreements were no longer in force and following the laborious process of negotiating a regulation on local border traffic, the same Member States were asked to implement the rules in the regulation by local border traffic bilateral agreements once more (with the same countries), which they had been forced to denounce less than 10 years earlier (and in some cases, less than three years earlier)[10].

[10] For more details on the Local Border Traffic Regulation, see Part II of Chapter 8.

3. From EU Members to Schengen Members – the period prior to accession to Schengen

The Member States that joined the EU in 2004 and in 2007 had to apply a large part of the Schengen *acquis* and related measures when they joined the EU.[11] The list of these provisions was included in Annex I to the 2003 Act of Accession and the 2005 Act of Accession respectively.[12] This included the obligation to apply the rules on visa lists, the visa format, and external border controls (except for checks in the SIS).[13]

A second part of the Schengen *acquis* was to be applied only upon full membership in Schengen, following a decision of the Council to that end. In this group fall: the abolition of internal border controls, the full application of all Schengen/EC rules on the conditions for issuing visas, and the rules on the freedom to travel. In the area of visas, the new Member States were immediately subject to the Schengen rules on the link between travel documents and visas[14] and certain parts of the Common Consular Instruction.

As to the measures adopted following the agreement on the Accession Treaty, and thus not included in the list of Annex I to the Act of Accession, many of them contained explicit provisions indicating that apply immediately to the new Member States (such as the visa format Regulation, the proposed Regulation on border traffic; the EC border fund; and the two transit proposals of 2005). In some other cases these measures come into force only after a certain delay (the proposed VIS and SIS II measures only apply when the Schengen rules fully apply). Other measures have an even more complicated set-up, for example, a part of the Borders Code Regulation applies immediately in part (external borders) and in part only after a delay (internal borders). [15]

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[11] See Article 3 of the Treaty of Accession and Annex 1 to that Treaty (O.J. 2003, L 236).

[12] See Annex I to the 2003 Act of Accession: List of provisions of the Schengen *acquis* as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on and applicable in the new Member States as from accession (referred to in Article 3 of the Act of Accession), O.J. 2003, L 236.

[13] They also had to apply the ARGO Programme and the EC-China ADS treaty immediately upon accession, which contains a special Protocol concerning the new Member States.

[14] Article 13 of the Schengen Convention, which set rules linking visas to the validity of the travel document and to its recognition by the Member States.

[15] Cited in S. PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford EC Law Library, (Oxford, 2006), p.118.

To sum up, as far as visas were concerned, in the period between the EU accession and the Schengen accession, the new Member States had to respect the visa list and the visa format but did not have to apply the common rules on the conditions for issuing visas. This was one of the possibilities left for the flexible application of EC visa rules. Another was the fact that although the new Member States issued visas according to the common format, these were national and not Schengen visas.

Not surprisingly, faced with the need to find a legal tool appropriate for the maintaining of friendly borders with their neighbouring countries, most 'new' external border countries opted for a set of flexible application tools. Each of them was targeted at a particular group of travellers facing difficulties and thus resulted in the creation of various degrees of rights. Also, depending on the foreign relations between the countries involved, the changes were either introduced as an overarching political priority (as was the case in Poland) or as a simple technical necessity required by the geographical location (as is the case with Kaliningrad).

Overall, there are three groups of problems resulting from the change in border control regimes. The first arises when there is a large national minority left behind in a neighbouring third country. The second relates to the potential disruption of border traffic, be it economically motivated or resulting from recent border changes in the region (e.g. cemetery visits, etc.). The third group of problems has a peculiar nature, it relates to the only enclave in the EU territory, the case of Kaliningrad (as will be discussed in detail in Part I of Chapter 8).

The measures employed by the candidate countries to resolve all these problems and their effect prior to the accession to Schengen will be subject of analysis in the following pages.

3.1. Ensuring contact with the motherland for minorities[16]

As was previously indicated, most of the countries on the new external border have significant diasporas in countries in their neighbourhood. Precise numbers are always difficult to obtain, but it is widely estimated that in Ukraine there are approximately 204,600 Bulgarians, 156,000 Hungarians, 151,000 Romanians, and 144,000 Poles.[17] In Romania there are approximately 1,432,000 Hungarians, 61,000 Ukrainians, 22,500 Serbs and 17,200 Slovaks.[18] In Moldova there are 283,000 Ukrainians and 90,000 Bulgarians.[19] In Serbia there are 293,000 Hungarians, 70,000 Croatians, 59,000 Slovaks, 35,000 Romanians and 20,000 Bulgarians.[20]

Most of these minorities have rights (individually or collectively recognized), including the right to a cultural link with the motherland. In most instances border traffic agreements were in place to guarantee these rights. Faced with the prospect of access to the motherland becoming more difficult, the candidate countries had two options – either to introduce accelerated procedures for citizenship or to provide some other kind of documentation to facilitate the movement of the minority members.[21]

(i) 'Fast- track' citizenship[22]

Some, but not all, countries have chosen this legal tool to help their national minorities abroad. The key legal aspect in the context of this work is that the choice of facilitating the acquisition of citizenship for certain groups remains an exclusively national matter under EU law since citizenship laws remain a national competence.

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[16] See TÓTH, "Kin-minority, Kin-state and Neighbrouhood Policy in the Enlarged Europe", *Central European Political Science Review*, vol. 5, n. 17 (2004), pp. 14-25, TÓTH, "Relations of Kin-state and Kin-minorities in the Shadow of the Schengen Regime, *REGIO – Minorities, Politics, Society*, vol. 9, (2006), pp. 18-46.

[17] Council of Europe, "Compendium of Cultural Policies and Trends in Europe, 10th edition", *Council of Europe/ERICarts*, (2009), available at: http://www.culturalpolicies.net/web/ukraine.php?aid=421.

[18] Romanian Department of Interethnic Relations, 2002, available at: http://www.dri.gov.ro/documents/ds_etniesilbmaternamedii.pdf.

[19] Council of Europe, "Compendium of Cultural Policies and Trends in Europe, 10th edition", op. cit.

[20] Council of Europe, "Compendium of Cultural Policies and Trends in Europe, 10th edition", op. cit.

[21] For a general overview see HALÁSZ AND MAJTÉNYI, "Constitutional Regulation in Europe on the Status of Minorities Living Abroad", *Minority politics and Minorities Right*, Minorities Research 4, (2002), available at http://epa.oszk.hu/00400/00463/00004/pdf/135_majteny.pdf.

[22] For a recent comparative analysis of the specificities in the citizenship policy of the new EU Member States, see A. LIEBICH, "Introduction: Altneulaender or the vicissitudes of citizenship in the new EU states", in R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, 2009

This approach (granting fast track citizenship) could, in principle, have been used without limits and without interference from the EU. However, for a variety of political and economic reasons, this approach was not chosen by many countries. Bulgaria and Poland provide two contrasting examples

For example, Bulgaria has such a fast-track procedure, which limits the number of requirements a foreigner has to fulfil in order to qualify for naturalization and thus benefits the applicants of Bulgarian ethnic origin.[23] This is not the case in Poland, where the conditions for naturalization are quite stringent and the requirement of uninterrupted residence of 10 years always applies, even for applicants for citizenship of Polish ethnic origin.[24]

The type of regulation chosen is of course linked to the public perception of the problem. While in some cases the naturalization procedure is not questioned and rarely discussed (e.g. in Bulgaria and Poland) in other cases, it is a hot political issue (as with the status law in Hungary as explained below).

From a legal perspective, the 'fast-track citizenship' option involves reducing the number of requirements an applicant has to meet before being granted citizenship. Usually, it is limited to age (18 years), a clean criminal record (although some limited

[23] See Article 15 (1) of the Law for the Bulgarian Citizenship. See also, Tchorbadjiyska, "Bulgarian Experiences with Visa Policy in the Accession Process: A Story of Visa Lists, Citizenship and Limitations on Citizens' Rights", Regio, 1, (2007), pp. 88-105, and more recently, D. Smilov and E. Jileva, "The politics of Bulgarian citizenship: National identity, democracy and other uses" in R. Bauböck, B. Perchinig and W. Sievers (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, 2009

[24] There is five-year residence requirement for naturalization (permanent residence permit). "Although the exact period of total legal residence in Poland varies for different groups of foreigners, the requirement of permanent residence permit amounts to at least ten years of residency before a foreigner can apply for naturalization, because it takes at least five years to obtain a permanent residence permit". See A. GORNY AND D. PUDZIANOWSKA, "Same letter, new spirit: Nationality regulations and their implementation in Poland", in R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, (Amsterdam, 2009), p.129. This naturalization procedure is to be distinguished from the process of repatriation based on the Repatriation Act of 2000. This latter Act automatically confers Polish nationality upon crossing of the border, for holders of a special repatriation visa. The requirement for the latter is Polish descent (which is defined as past Polish nationality or ascendants who were ethnic Poles or held Polish nationality. Thus, this law uses both an ethnic criterion (Polish descent) and a cultural criterion to determine a person's belonging to the Polish nation.

interpretation can apply also here) and ethnic origin[25] (proved through a system of documents, issued by authorities of the third countries or religious institutions abroad). Thus, criteria such as the minimum number of years of residence in the country or the command of the official language of the country are usually waived for the sake of expedience.

Of course, the citizenship option can only be applied if the country of residence (in effect a third country as far as the EU is concerned) tolerates dual citizenship. If this is not the case, the incentive of acquiring the citizenship of the motherland decreases (see for example the similar case of the Greek minority in Albania discussed in Chapter 6) or it leads to migration to the motherland.

Among the ethnically diverse and mixed new Member States and their neighbours, mass applications for citizenship have only been witnessed in Bulgaria (mainly from Macedonian and Moldovan citizens) and in Romania (from Moldovan) citizens. In the case of Bulgaria[26] some 11,000 persons of Bulgarian origin living in Moldova were granted Bulgarian citizenship between 2001 and 2007 and make up an important part of the Bulgarian minority living there. The same is true for Macedonians, 14,000 of whom have received Bulgarian citizenship over the same period. In the case of Romania[27] there are no official statistics' but estimates show that from 1999 to 2002 the Romanian state was issuing Romanian passports to Moldovan citizens using a

[25] One can of course question the tenability of ethnicity-based discrimination in a 21st century Europe; but the existing citizenship laws often hark back to a different era (usually the formation of the nation state itself). De facto 'ethnicity' coincides in most cases with the language spoken at home. Many of the old Member States also have citizenship laws which are based on the 'ius sanguinis'. For the latest comparative review and analysis of the citizenship laws in the EU Member States, see BAUBÖCK, ERSBOL, GROENENDIJK AND WALDRAUCH (eds), *Acquisition and loss of nationality: policies and trends in 15 European countries*, v. 1 and 2, Amsterdam University Press, (Amsterdam, 2006) and R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, (Amsterdam, 2009).

[26] See on Bulgaria, TCHORBADJIYSKA, "Bulgarian Experiences with Visa Policy in the Accession Process: A Story of Visa Lists, Citizenship and Limitations on Citizens' Rights", *Regio*, 1, (2007), p.88-105; E. JILEVA, "Insiders and outsiders in Central and Eastern Europe: The case of Bulgaria", in Groenendijk, Guild and Minderhoud (eds), *In Search of Europe's Borders*, Kluwer Law International, (The Hague, 2002), p.273-287.

[27] See on Romania, DURA, "A tale of two visa regimes: repercussions of Romania's accession to the EU on the freedom of movement of Moldovan citizens", *UNISCI Discussion Papers*, n. 10, (2006); TOMESCU-HATTO AND HATTO, "Frontières et identités: La Roumanie et la Moldavie dans l'Europe élargie", *Études internationales*, vol. 36, n. 3, (2005), p. 317-338, [Borders and Identities: Romania and Moldova in the Wider Europe] and C. IORDACI, "Politics of citizenship in post-Communist Romania: Legal tradition, restitution of nationality and multiple memberships", in . R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, 2009.

fast-track application procedure. Romania grants citizenship to Moldovans whose parents or grandparents were Romanian citizens before 1940, when Moldova was part of Romania. However, the law was altered in 2003 and a residence clause of four years was added, which made it very difficult for most Moldovans to become Romanian citizens and created a huge backlog of citizenship applications. Nevertheless, the estimates are that at present between 200,000 and over half a million Moldovan citizens also hold a Romanian passport.[28]

(ii) Other citizenship replacing measures

This includes different types of measures designed to facilitate the cross-border contacts of minorities, such as 'nationality cards' issued according to ethnic origin. These cards are not a substitute for visas, but most national visa regimes provide for the facilitated issuance of multiple-entry visas or national visas for their holders.

Such measures are used when simplified naturalization procedures are not possible. For example, in Hungary, following a failed referendum, the idea of facilitated citizenship procedure to their ethnic kin (mainly in Romania and Serbia) was not approved.[29] Thus, the government was forced to come up with an inventive new form: the status law. A special type of 'certificate' was created granting access to the territory and to the labour market similar to the special ID card developed for the Greek minority members in Albania (see Chapter 6).

[28] DURA, op. cit.

[29] On 5 December 2004, Hungary held a referendum on whether it should offer Hungarian citizenship to Hungarians living outside the borders of the Hungarian state. The novelty of the proposal was not the introduction of the possibility for dual citizenship (as it already existed) but in the waiving of all residency requirements as conditions for obtaining a Hungarian second citizenship. The text of the referendum question was as follows: "Do you think that Parliament should pass a law allowing Hungarian citizenship with preferential naturalization to be granted to those, at their request, who claim to have Hungarian nationality, do not live in Hungary and are not Hungarian citizens, and who prove their Hungarian nationality by means of a "Hungarian Identity Card" issued pursuant to Article 19 of Act LXII of 2001 or in another way to be determined by the law which is to be passed?". Ultimately the referendum failed due to the low participation – 63.33 per cent of the eligible voters shunned the poll. The results among those participating were 51.57 per cent in favour of the reform and 48.43 per cent against. For the most recent analysis of the issue, see M. KOVACS AND J. TOTH, "Kin-state responsibility and ethnic citizenship: The Hungarian case" in R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) *Citizenship Policies in the New Europe*, Amsterdam University Press, 2009. See also TÓTH, "Principles and Practice of Nationality Law in Hungary", *REGIO – Minorities, Politics, Society*, vol. 8, (2005), pp. 21-39; and Halász, "Dual Citizenship as an Instrument of the Hungarian Policy Towards the Nation?", *REGIO – Minorities, Politics, Society*, vol. 8, (2005), pp. 73-86.

The Hungarian "Magyar Igazolvány" or Hungarian Certificate allows its holder to acquire a Schengen visa in a facilitated procedure, foregoing the presentation of official invitation letters and other proofs of purpose of travel. The certificate also provides an exemption from the requirement of documents proving "sufficient means of subsistence" when paired with a declaration from the local association of Hungarians.[30] The Hungarian Parliament adopted the "Act on Hungarians living in neighbouring countries" on June 19, 2001,[31] which became known as the "status law".[32]

The Polish "Karta Polaka" (Card of the Pole) introduced on 29 March 2008[33] (one day before the final step for full Schengen integration) not only simplifies the procedure of acquiring a multiple-entry national visa valid only in Poland but the holder is also eligible for exemption from Schengen visa fees.[34] The Card of the Pole is a document stating allegiance to the Polish nation. It can be granted to people who do not have Polish citizenship or permission to reside in Poland and who are citizens of the former

[30] LASTOFKA, "The proliferation and evolution of visa regimes on the Eastern Border of the European Union", *Hungarian Association for Migrants*, Working Paper n. 7, (2009).

[31] Law LXII/2001 on Hungarians living in neighbouring countries.

[32] For more on the "status law" see: KÁNTOR, "Re-institutionalizing the Nation – Status Law and Dual Citizenship", *REGIO – Minorities, Politics, Society*, vol. 8, (2005), pp. 40-49, KOVÁCS, "The Politics of Non-resident Dual Citizenship in Hungary", *REGIO – Minorities, Politics, Society*, vol. 8, (2005), p. 50-72, KÁNTOR, MAKTÉYI, IEDA, VIZI AND HALÁSZ (eds.) *The Hungarian Status Law: Nation Building and/or Minority Protection*, Sapporo: Hokkaido University – Slavic Research Center, 2004; IEDA (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?*, Sapporo: Hokkaido University – Slavic Research Center, 2006; IEDA, "Ideological Background of the Amendment Status Law Controversy in Hungary", *Central European Political Science Review*, vol. 5, n. 16, (2004), pp. 7-20; SCHÖPFLIN, "Hungary and the EU: the Status Law and After", *Central European Political Science Review*, vol. 5, n. 16, (2004), pp. 21-28; HALÁSZ, "The Ethnicity and Territory in the Central and Eastern European Status Laws", *Central European Political Science Review*, vol. 5, n. 16, (2004), pp. 57-67, MAJTÉNYI, "Utilitarianism in Minority Protection?: Status Law and International Organisations", *Central European Political Science Review*, vol. 5, n. 16, (2004), pp. 68-77; VÍZI, "The Evaluation of the 'Status Law' in the European Union", *Central European Political Science Review*, vol. 5, n. 16, (2004), pp. 78-91.

[33] The card was established by Act on the Pole's Card (*Ustawa o Karcie Polaka*, Dz. U. 2007 no. 180/1280) of 7 September 2007. The Act specifies the rights of the holder of the Card, the rules for granting, loss of validity and rescission of the Card, and the competencies of the public administration bodies and procedures in these cases. The Act entered into force on 29 March 2008, one day before the final integration of Poland into the Schengen area on 30 March 2008, when the border controls on internal EU flights were lifted. See also, A. GORNY AND D. PUDZIANOWSKA, op.cit.

[34] For details on the card see information of the Polish Ministry of Foreign Affairs, available at http://www.msz.gov.pl/Card,of,the,Pole,15832.html; for the reaction of the neighbouring states see "Lining up to Prove Polish Descent", Warsaw Voice, available at http://www.warsawvoice.pl/view/17583/ and for analysis of the provisions see GORNY AND PUDZIANOWSKA, op.cit.

Soviet Union states.[35] The card-holder is entitled to all the benefits as stated in the Parliamentary Bill, passed by the Polish Sejm on 7 September 2007 and these include:

- obtaining a long-term visa enabling a multiple Polish border crossing,
- taking-up legal employment without having to obtain a work permit,
- running a business in Poland on the same conditions as the Polish citizens,
- taking advantage of the Polish education system, free of charge,
- using the Polish medical services, in emergencies, on the same conditions as Polish citizens,
- applying for financial support from the state budget or from the communal authorities devoted to supporting the Polish citizens abroad.

The granting of the Card of the Pole does not imply Polish citizenship, nor does it give the right to settle on the territory of the Republic of Poland or cross the Polish border without a valid visa.

3.2. Facilitated conditions and procedures for issuing visas and crossing the border[36]

[35] The reason why this card was available for citizens of the former Soviet Union is that due to the extensive changes of the border of Poland before and after the two World Wars a considerable number of persons of Polish descent are still living in the territory of the former Soviet Union. Poland's borders were changed after World War 2, when large a slice of what was then the eastern part of Poland were annexed by the Soviet Union (nowadays mainly belonging to Belarus and Ukraine) and most, but by far not all, of the Polish inhabitants expelled. These displaced persons were resettled, mainly in parts of formerly German territories. These territorial exchanges were ratified in a Polis-FSU treaty of 1947.

[36] For the responses of the different new Member States, see BORATYNSKI ET AL., *Monitoring of Polish Visa Policy*, Report, Stefan Batory Foundation, (Warsaw, 2004); BERANYI, "Short-term Impacts of Enlargement in the Romanian and Hingarian Border Crossing", *REGIO – Minorities, Politics, Society*, vol. 9, (2006), pp. 100-129; VÁRADI, "The Visa in Practice at the Serbian and at the Ukrainian borders", *REGIO – Minorities, Politics, Society*, vol. 9, (2006), pp. 150-178; BORATYNSKI AND SZYMBORSKA, Neighbours and Visas: Recommendations for Friendly European Union Visa Policy, Stefan Batory Foundation, (Warsaw, 2006); BILCIK AND DULEBA, *Carpathian Euroregion and External Borders of the enlarged European Union: confronting the effects of Schengen*, Carpathian Foundation, (Kosice, 2004); JILEVA, "Visa and free movement of labour: the uneven imposition of the EU acquis on the accession states", *Journal of Ethnic and Migration Studies*, vol. 28, n. 4, pp. 683-700, (2002); KRYSTYNIAK, "The Schengen Treaty – Its Consequences for Poland", *The Polish Foreign Affairs Digest*, vol. 4, n. 1 (10), (2004); P. KAZMIERKIEWICZ, *Schengen Integration as a Challenge to Polish Visa Policy Towards Eastern Neighbours*, The Institute of Public Affairs, Analyses & Opinions No 42, (Warsaw, 2005); P. KAZMIERKIEWICZ, *The Visegard States between Schengen and Neighbourhood*, The Institute of Public Affairs, (Warsaw, 2005); J. MISINA, "New Developments in Visa Regulations in Slovakia", paper presented at a Workshop "Visa and immigration policies of the Visegard countries", (2006), available at: http://www.visegrad.mtaki.hu/about/.

As mentioned earlier, most of the candidate countries had long enjoyed facilitated border traffic agreements. These had to be renounced before the accession date. Moreover, as of the date of accession the new Member States had to require visas from all countries on the EU visa black list. However, national visas and not Schengen visas were granted. The main political objective, in Poland for example[37] was to maintain the number of visits (border crossings) despite the introduction of visa requirements. In Poland, this objective was achieved through the implementation of several tools:

- waiving of the visa fee and granting cost-fee free visas to citizens of selected countries;
- maintaining a long list of exceptions, reasons for which visa-free access is granted;
- granting multiple entry visas.

All these measures obviously required the administrative strengthening of the consulates in the third countries, as the newly opened Polish consulate in Lvov had to issue almost a million visas a year.

Other countries (Bulgaria) preferred to go for the more general regulation and in the process decrease the administrative burden. The law allows for the issuing of visas at the border for a stay of up to 10 days, based on a bilateral intergovernmental agreement (this measure is used towards Macedonian and Serbian citizens).

Poland introduced a visa regime for its Eastern neighbours in October 2003, only a few months before its accession, and after lengthy attempts to find an alternative.[38] Introducing an extremely wide variety of 23 types of visas to suit every anticipated purpose of stay and transit, the new Polish visa regime was rather flexible.[39] This flexibility was motivated by the political imperative of maintaining close links with its neighbours on the 'outside' even after accession (something which had been widely

[37] WEINAR, "The Polish Experiences of Visa Policy in the Context of Securitization", *CHALLENGE paper*, WP 7, (2005), available at http://www.challenge.mtaki.hu/eng/pdf/5_working_papers/21.pdf.

[38] WEINAR, op. cit.

[39] Act on Aliens of 13 June 2003, *Dziennik Ustaw*, 2003-07-21, No. 128, pp. 8530-8567, English translation available at: http://www.legislationline.org/documents/id/6947.

discussed during Poland's accession negotiation process). As discussed above, the old Member States had no reason to object since this flexibility would be only temporary (until the full integration of Poland into Schengen) and would any grant access only to the territory of Poland until then.

Bilateral talks had been initiated earlier to reach mutually agreeable solutions with Ukraine, Belarus and Russia. Only Ukraine had accepted the offer of the Polish government. A bilateral agreement on the principles of the movement of persons was signed on 30 July 2003. It granted to Ukrainian citizens the possibility to acquire Polish visas free of charge (by contrast citizens of Belarus and Russia – not falling into one of the exemption categories provided for in the Polish Aliens Act of 2003 – had to continue paying between €10 and €50 for visas). Notwithstanding this waiving of fees and other procedural facilitations provided for in the agreement, the new visa regime had noticeable consequences for Ukraine. In the first months of its implementation, the number of border crossings dropped by 60% on the Ukraine-Polish border. Even a year later, by which time Poland had acceded, the numbers remained 20-25% lower than before.[40]

Hungary signed an agreement with Ukraine on the conditions of travel between the two countries in October 2003. The agreement introduced visa requirements for Ukrainian citizens but as with the Polish regime, the visa was free of charge. Apart from waiving visa fees, the agreement exempted flight and ship crews as well as holders of service travel documents from visa requirements. Those citizens of Ukraine who were travelling to EU destinations and holding Schengen visas could transit through Hungary visa-free. The visa procedure was relatively simple and quick; the agreement provided for a five day period to issue a visa with several exceptions where visas should be issued immediately. Based on the number of border crossings, the introduction of visas did not affect the opportunities of Ukrainian citizens to travel to Hungary. The number of Ukrainian citizens crossing the Hungarian border remained stable at around 2.5 million for the years from 2000 to 2005 without significant differences between the visa-free 2003 and the first year following the introduction of

[40] Stefan Batory Foundation, "Monitoring of Polish Visa Policy – Report Warsaw", (2004), available at http://www.batory.org.pl/doc/monitoring-of-polish-visa-policy-2004.pdf.

visas.[41] In 2003, Hungary also introduced visa requirement for citizens of Serbia and Montenegro, which contains a significant Hungarian minority. The visas were issued free of charge and with a very expedient procedure allowing for the issue of the visa on the same day, if the application was submitted by noon. However, the general requirements for a proof of means of subsistence, hotel reservations, etc. were maintained. But ethnic Hungarians wishing to travel to Hungary at the time had the possibility to receive a multi-entry visa if the goal of their travel was to visit family members. Despite the new restrictions, the number of border crossings by citizens of Serbia and Montenegro visiting Hungary remained steady throughout the period at around 3.4 million a year.[42]

A similar approach was followed by Bulgaria and Romania. Both countries delayed the introduction of visas to their 'closest' neighbours until the date of accession – 1 January 2007. Romania also negotiated a bilateral agreement with Moldova on the facilitation of issuing of visas in early 2006 and when it introduced visa requirements on 1 January 2007, two additional consulates were open. Despite these efforts and the quick procedure, travel between Moldova and Romania was severely disrupted for some time after Romania's accession to the EU, due to the overwhelming demand for visas.[43]

The situation in Bulgaria was similar. Prior to Bulgaria's accession to the EU and the respective introduction of visas, the considerable number of visitors from the western neighbours (Serbia and Montenegro and especially Macedonia) led people to believe that unless additional measures were taken, the introduction of visas would cause a sharp decrease in visitors and create problems in local and regional economies.[44] Since Macedonia's capital Skopje is easily accessible, geographical constraints do not hinder access to the consulate. There is, however, a human resource problem. While the Bulgarian Consulate in Skopje did issue visas to Macedonia nationals until 1

[41] LASTOFKA, op. cit.

[42] LASTOFKA, op. cit.

[43] See CONSTANTIN IORDACI, "Politics of citizenship in post-Communist Romania: Legal tradition, restitution of nationality and multiple memberships", in . R. BAUBÖCK, B. PERCHINIG AND W. SIEVERS (eds.) Citizenship Policies in the New Europe, Amsterdam University Press, 2009.

[44] V. SHOPOV, *Implementation of Schengen – Direct Influence to Socio-economic Reality*, European Institute, (Sofia, 2001).

January 2007, it is now required to issue almost a million visas per year. With only one additional consulate opened, it was necessary to increase the number of consulate employees in order to maintain the pre-visa levels of contact. Alternatively, an extensive list of exceptions to the visa requirements that would be applicable between the periods of EU and Schengen accession, as well as a multi-entry visa for the business travellers could be introduced. Attempting to avoid possible difficulties, Bulgaria initiated a two-fold plan of action prior to its EU accession. On the intergovernmental level, the Bulgarian government proposed and concluded agreements with Macedonia and Serbia regarding the mutual travel of their citizens, and on an administrative level, two more consulates were opened in Bitola (Macedonia) and Nis (Serbia) respectively. Both intergovernmental agreements have similar structures and content. They provide for certain rules that can facilitate the issuing of short-stay visas as well as the travel of citizens of Macedonia and Serbia to Bulgaria respectively. The agreement's main elements include:

1. Visa-free travel for holders of diplomatic and service passports.
2. Visas are issued for free, without the usual collection of the visa application and visa issuing fees.
3. Certain categories of citizens are released from the visa requirements due to their professional duties (airplane or ship crew members, rescue teams).
4. The possibility for issuing multiple-entry visas for a period of one year (mainly in the context of international transport agreements).
5. The possibility for a fast-track procedure for certain categories of applicants (in the context of official visits and administrative cooperation, or in cases of family emergencies).

Both agreements became effective on 1 January 2007. Meanwhile, two developments at the European level might influence the future existence of these bilateral agreements. On the one hand, the Regulation on local border traffic[45] has entered into force, and the Bulgarian government has expressed its intention to negotiate bilateral

[45] Regulation (EC) Nr. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (O.J. 2006, L 405).

agreements with Macedonia and Serbia on this issue.[46] On the other hand, the EU negotiated and signed visa facilitation agreements with Macedonia and Serbia which over-ride some of the provisions of the bilateral agreements. Whether these activities at intergovernmental and EU level will result in better odds for Macedonians and Serbians to easily travel to Bulgaria remains to be seen.

However, it is clear that, despite Bulgaria's efforts, the introduction of visas has led to a dramatic decrease in travel. Whether this decrease is only temporary or is a more permanent phenomenon is not yet clear. But the data available[47] are unequivocal: the number of visitors to Bulgaria from Macedonia and from Serbia fell in 2007 (compared to 2006) by about 70%.[48]

Finally, an example of what can happen if no special measures are foreseen when a visa regime is introduced abruptly can be seen in the case of Slovakia. It introduced a strict visa regime for Ukrainian citizens already in June 2000. There was no provision for a waiving of visa fees, thus Ukrainian citizens had to pay 24 USD for a single-entry visa. According to some experts, the introduction of this regime was done "without any previous economic and political impact assessment".[49] The termination of the visa-free travel regime and the agreement facilitating the border-crossing procedures of residents of border municipalities had a dramatic effect on legitimate travel between Ukraine and Slovakia, with the number of Ukrainian citizens crossing the border to Slovakia dropping from 1,435,000 in 1999 to 291,000 in 2001 – a fall of about 80%, increasing very gradually thereafter.[50] This situation led to an increase in

[46] Such a possibility is explicitly mentioned in Article 16 of both the Agreement between Bulgaria and Macedonia regarding the mutual travel of citizens, and the Agreement between Bulgaria and Serbia on the mutual travel of citizens.

[47] See data on visitors to Bulgaria in 2007 from the Bulgarian National Statistics Institute, available at: http://www.nsi.bg/index_en.htm

[48] See also, Macedonian News: Long Queues for Bulgarian Visas in Macedonia, 8 January 2007, http://www.vmacedonianews.com/2007/01/long-queues-for-bulgarian-visas-in.html , Macedonians Wait Months for Bulgarian Visas, Balkan Investigative Reporting Network, 15 February 2007, http://birn.eu.com/en/70/10/2301/

[49] MARTIN SIRÁK, "Slovakia in 'Schengenland': Political and Governance Issues", *Institute of Public Affairs*, Report 3 of Migration and Eastern Policy Programme, , Warsaw, (2002), p. 7, available at: www.lgi.osi.hu/cimg/0/0/1/8/Sirak_Report03.doc.

[50] Research Centre of the Slovak Foreign Policy Association, "Feasibility Study for Consular and Visa Cooperation Among Visegrad States for Residents of Ukraine and Moldova", (2005) at: www.visegrad.mtaki.hu/workingpapers/misina_paper.pdf. Of course, there is no hard data on illegal crossings. But the numbers are unlikely to be very high given that the border in question is rather short and well guarded.

political tensions and even a threat on the side of Ukraine to introduce a visa for Slovak citizens, thereby terminating the bilateral readmission agreement. Faced with such difficulties, Slovakia proposed a bilateral Agreement on the Liberalisation of the Border Regime, which entered into force in March 2001. Some of the simplifications regarding visa procedures included the abolition of the requirement of the official invitation letter and the abolition of a visa fee for certain categories of traveller. In addition, Slovakia introduced further exemptions, providing residents in selected villages from the border multiple entry visas free of charge.[51]

4. When old borders disappear – the post-accession period to Schengen

The ultimate integration into Schengen of the new Member States takes place following a report, individual for each of these states, delivered by SCHEVAL, the Schengen evaluation team.[52] Despite the guarantees about deciding each case on its own merits, due to possible complications at internal borders if one country joined Schengen while the others remained outside, there was an understanding that all countries of a certain group (say the EU10 and EU2) had to join at the same time. This condition, when coupled with the necessity of integrating the countries into the new generation Schengen information system (SIS II), in reality had the consequence of delaying the actual date of full Schengen integration for the EU10 until all of them were declared ready.

[51] Stefan Batory Foundation, "The Enlarged European Union and Ukraine – New Relations", Final report, (2004), available at: http://www.batory.org.pl/doc/final_rep.pdf

[52] The SCHEVAL was already established under the Schengen Convention and is composed of one high-ranking representative from each Schengen state with the Commission participating as an observer. SCHEVAL has a dual task: first, the evaluation of candidate states prior to their entry into the Schengen system and second, ensuring that the Schengen *acquis* is properly applied by States already implementing it. See, Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex ((98) 26 def).It is of course in general difficult for sovereign states to accept a technical evaluation as a basis for a decision of the highest political importance; hence, the importance of the composition of the SCHEVAL team. This situation is analogous in the area of monetary union where the Commission has to prepare a 'technical' report on the four Maastricht criteria for accession to the euro area, in both cases the Member States wanting to join (Schengen area or euro area) is 'demandeur' and thus is not in a strong political position to object to the nature of the evaluation or to the composition of the evaluation team. See also, the Commission proposal for a Regulation on Schengen evaluation (COM(2009) 102, March 2009).

On 6 December 20007, the Council took that decision,[53] provided for in Article 3(2) of the 2003 Act of Accession in relation to the Schengen Convention and the Schengen *acquis*. After verification that the necessary conditions for the application of the Schengen *acquis* had been met in all areas, the Council decided that the provisions of the Schengen *acquis* referred to in Annex I to the decision should apply to the Member States concerned (all countries that acceded in 2004 except Cyprus) and in their relations with the other Schengen States, as of 21 December 2007. The abolition of checks on persons at internal air borders was postponed until 30 March 2008. Annex I of Council Decision 2007/801/EC contains the *acquis* whose application was postponed in the Act of Accession pending a decision of the Council to this effect.[54]

The actual effects of Schengen integration are numerous but we will concentrate here only on the ones linked to visa policy and border controls. First and foremost, after the date in question, the body of the Schengen *acquis* was to be applicable on the territory of all of the new Member States. As mentioned earlier, and indicated in the Accession Treaty,[55] only parts of the *acquis* applied until that point.

In practice, the greatest effect of full Schengen integration was the lifting of internal border controls between the old and new Member States, allowing their citizens to benefit fully from the free movement of persons provisions in the EC law. The lifting of those internal border controls implied that the controls on the EU's external border were deemed to be sufficiently secure.

[53] Council Decision 2007/801/EC of 6 December 2007 on the full application of the provisions of the Schengen *acquis* in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, O.J. 2007, L 323/34.

[54] Note that Annex I to the Act of Accession, op.cit., lists only the part of Schengen acquis binding on and applicable in the new Member States as from accession, while Annex I of the Council Decision 2007/801/EC lists the *acquis* to be rendered applicable following the lifting of the internal border controls.

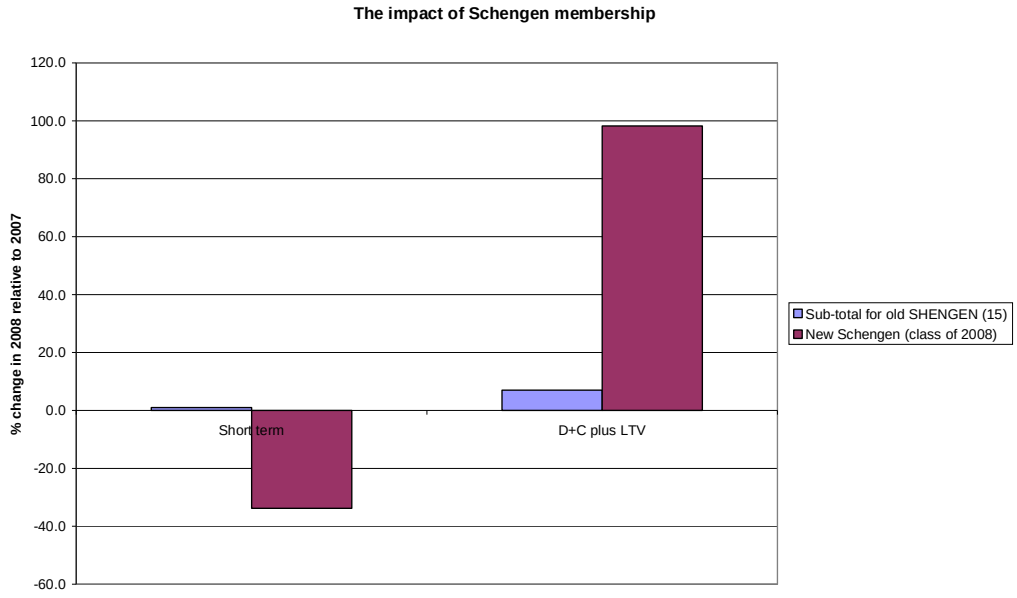
[55] Article 3 of the Treaty of Accession and Annex I to the 2003 Act of Accession: List of provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it, to be binding on and applicable in the new Member States as from accession (referred to in Article 3 of the Act of Accession), O.J. 2003, L 236.

As far as visas are concerned, from the date of Schengen membership in 2008,[56] the new Schengen Member States had to stop issuing their national visas and start issuing the common Schengen visa. This rule, obviously, applied only to the short-term common visas while the long-term visas remained national, as well as the residence permits issued by them. Thus, all previously existing arrangements for visas issued according to the simplified rules, including free-of-charge visas for specific countries, no longer applied. The impact on the ground was substantial.

As chart 7.1 below shows, the number of short-stay visas issued by the countries that lifted border controls in 2008 fell by over 35 %. This cannot be due to the recession starting that year because the old Schengen-15 issued slightly more short-term visas in 2008.

The pattern for other types of visa (D, D+C and LTV) is completely different. The new Schengen members issued about twice as many in 2008 as in 2007, whereas the increase was only about 10 % in the case of the old Schengen-15. This is a clear indication that there was some substitution between short-term and long-term visas.

Figure 7.1. Change in the number of short-stay visas issued, 2008 in relation to 2007



Source: Own elaboration on Council statistics, Council doc. 12493/09, and Council doc. 8215/08, Exchange of statistical information on uniform visas issued by Member States' diplomatic missions and consular posts for the years 2008 and 2007 respectively.

[56] December 25, 2007 for land borders, March 2008 for air travel.

These patterns can also be observed in the case of Poland, which accounts for over half of the total of the visas issued by the new Schengen States. The impact of Schengen accession on visa issuance for Poland was striking. The country issued 41% fewer visas in the year following its accession to the travel free area.[57] Most of this fall was due to a drop of almost two thirds (from over 860 000 to about 300 000, a drop of about 63 %) in short-term visas to visitors from its two neighbouring countries (Belarus and Ukraine) which accounted for over half of the total in 2007. This is exactly what had been anticipated, namely that the additional cost and time delay resulting from the application of the Schengen *acquis* would represent an important barrier to cross border movements (about half a million visitors per year less). It is difficult to judge whether the availability of local border traffic instruments discussed in chapter 8 (part II) could compensate for the drop in the availability of short-term visas.

While short-term visa issuance fell markedly, many more long-term (national) D visas were issued by Poland in 2008. The number of long-term visas went up by over 300% (from about 40 000 to 170 000), but in this case there is an even more pronounced difference between the number for the two neighbours (up over 500% for Belarus and Ukraine) and the number for all other countries (up only 17%). In 2008 over 90 % of all D type visas issued by Poland were issued in Belarus (25% of total) and Ukraine (67% of total). However, despite the huge increase in long-term D visas, the total of all types of visas issued in the two neighbours fell still by 47%.

Table 7.5 The impact of Schengen on visa issuance in Poland

Percentage change 2008/7	Short term	D Visas	All types
Grand total	-54	334	-41
Total minus two neighbours	-27	17	-23
Two neighbours (BEL+UKR)	-63	503	-47

Source: Own elaboration on Council statistics, Council doc. 12493/09, and Council doc. 8215/08, Exchange of statistical information on uniform visas issued by Member States' diplomatic missions and consular posts, respectively for the year 2009 and 2008 own elaboration on the basis of Council statistics.

[57] Somewhat surprisingly the number of visa issued outside these two neighbouring countries also fell, by a lot less, but still by 27 %. The most likely explanation might be that Poland (i.e. its consulates abroad) simply had difficulties implementing the new regime.

Regarding the use of the long-term visa, a comparison with Germany might be useful because that country also has traditional links to Eastern Europe. By 2008 Poland issued more long-term visas than Germany (159 000 versus 140 000), but only one third as many short-term ones. Moreover, the concentration was completely different. In the case of Germany only 5% of its long-term visas were issued in Ukraine and even less in Belarus.

The visa issuing pattern in Poland thus remains heavily skewed towards its immediate neighbours. This suggests that the available instruments, such as the special rules for local border area were apparently not sufficient (at least in the judgment of the Polish authorities) to maintain the desired level of movement across the border. Poland apparently used the only instrument still under national control (longer-term visas) to compensate for increased difficulties in issuing short-term visas following its full accession to Schengen.[58]

5. Reasons for the tensions

The previous section has documented that full Schengen membership did have an impact on visa issuance and hence the ability of the new member states to maintain contact with their neighbours East of the EU (for Poland alone the number of short term visa issued in Belarus and Ukraine dropped by half a million). Hence the concerns that the new member states did have in this context were justified. These concerns had been the motivation for the specific flexibility measures discussed in Chapter 8 (Kaliningrad, local border traffic and visa facilitation)

But there can be many other reasons to explain the tensions arising in the new Member States related to the transfer of sovereignty in the visa field. One could be the problem of recently acquired sovereignty and the subsequent unwillingness to transfer parts of it to a supranational entity. This is mostly valid for countries such as the Baltic States or, as might become relevant in the future – the ex-Yugoslavian states,

[58] It remains to be seen whether this increased use of long term visas in the new member countries leads to pressure for more harmonisation of the rules of longer term visas as well. EU action would be possible under the Lisbon Treaty (which speaks about common visa policy without the qualification of visas up to three months validity which had existed previously).

which only recently started life as independent states. The problems arising in the constitutional law field here have already been analyzed by Albi.[59]

The new Member States were willing to cede to the EU this key aspect of sovereignty (control over persons), but they had specific concerns which they wanted to see addressed. At the same time, the Eastern enlargement also raised new sensitivities in the old Member States as will be discussed below.

Another reason for the tensions can be found in the greater sensitivity of the new Member States towards issues such as borders and free movement.

Visas are a contentious subject between representatives of the new and the old Member States. For the old Member States, visas are a pure technicality hidden beneath immigration law provisions, understandable only by pure specialists and in any case a subject that poses no intellectual challenge. For them, the passion with which the issue is discussed in the new Member States is incomprehensible, even more so when it leads to demands to modify a system that has already existed for more than twenty years with proven efficiency. The usual argument is that the conditions for accession were known in advance and if they did not correspond to the beliefs or policy priorities of the new countries, they had the option of not joining the Union. Hence, the demands for change, once inside, are perceived as somewhat improper. What could be the reason for this mismatch in perceptions? Why, on the issue of visas, which are inevitably linked to the free movement of persons, do the old and new Europe appear to hail from different worlds? This section will put forward a possible explanation of the phenomenon. It is based on two elements: the difference in the characteristics of the old and new external borders and the types of checks performed there, and the difference in the understanding and value of the principle of free movement.

[59] A. ALBI, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, Cambridge University Press, (Cambridge, 2005).

5.1. Old and New Borders[60]

Despite the fact that the movement of the external borders of the EU is an automatic exercise; a result of the entry into force of an accession treaty, notably the 2003 and 2005 Accession Treaties, these border changes are in fact laden with symbolism.

5.1.1. The old external border of the old (Western) Member States

The external border of the EU and previously of the EC has been subject to frequent change, due to the expansion of the Schengen area and consecutive EU enlargements. Nevertheless, the concept of a common external border and common rules that apply to it was born with the Schengen Agreement of 1985. The Agreement itself was concerned only with the removal of internal frontier controls, with the focus being on the liberalization of travel within the common Schengen territory. Although at the time there was some apprehension that such liberalization might lead to tougher external controls and the construction of what was later called a 'Fortress Europe,' no great consideration was given to this fear. Why?

One possible explanation could be that when the Schengen Agreement was negotiated and signed, Europe had a completely different geo-political architecture from today. The external border of the Schengen group, which later was to include almost all continental EC Member States, was modelled on the East-West Divide. It followed the borders set after World War II. What were the characteristics of this border?

As a result of the division of Europe post-World War II, the maps of certain areas, notably between East and West Germany, were significantly redrawn, rendering the border a symbolic dividing line between two political systems. In the early years after World War II, there were huge flows of persons trying either to escape the newly

[60] For a general overview of the new Member States' characteristics, see R.J. CRAMPTON, *Eastern Europe in the Twentieth Century and After*, 2nd edition, Routledge, (London, 2007); and CRAMPTON AND CRAMPTON, *Atlas of Eastern Europe in the twentieth century*, Routledge, (London, 1996). For the relationship along the new borders see M. ANDERSON, *Frontiers: Territory and State Formation in the Modern World*, Polity Press, (Cambridge, 1996); ANDREAS AND SNYDER (eds), *The Wall around the West: State Borders and Immigration Controls in North America and Europe*, Rowman & Littlefield Publishers (Lanham, 2000), J. BATT, *The EU's new borderlands*, Centre for European Reform, (London, 2003), BLONDEL, "The challenge of integrating East and West in the EU", in ÁGH AND FERENCZ (eds), *Overcoming the EU Crisis: EU Perspectives after the Eastern Enlargement*, Together for Europe Series (Budapest, 2007).

established communist system in the East (Germans moving East to West) or, if they belonged to minorities, trying to return to their fatherland (Germans moving from Konigsberg when it had become Kaliningrad).

Once this displacement process ceased (some time in the late 1950s), the reinforcement of the border began in earnest and its characteristics (which remained valid for the following half century) were formed. These included:

- complete militarization of the border on the eastern side and on the western side, notably in Germany;
- decrease in the number of border crossing points and heavy controls of the existing crossing points; (for example on the more than 400 km long border between Bulgaria and Greece, there were only two border crossing points);
- development of certain conditions (like visas or other entry conditions) ultimately aimed at decreasing the flow of persons.

Despite all these reinforcements, crossing the border was still possible and followed quite uncomplicated rules for West Europeans travelling to the East. This was not the case for travels from East to West, however, the reasons for which will be demonstrated later.

Meanwhile, within Western Europe itself, the borders did not prove to be a huge impediment to travel, especially of persons, and especially for short-term stays. Thanks to the various regional arrangements and numerous bilateral agreements, the movement of individuals across almost all West European borders proved unproblematic. Hence, at the time of signature of the Schengen agreement, there were no concerns about developing a friendly external border. The relevant external (land) border coincided with the Iron Curtain.

5.1.2. The nature of the external border of the new Eastern Member States

In the period before the transition process, which started at the end of the 1980s and gained momentum in the 1990s, the borders of the now new Member States had very specific characteristics.

First of all, all of the borders, both to the West and the East, were militarized. There was military force both at the border with the West and at the border with the then Soviet Union. The borders between the socialist countries themselves were subject to low military presence but were still guarded by the military.

The militarization of the border meant that:

- border crossings were only possible at the few available crossing points;
- huge areas of the actual border were fenced to prevent illegal crossings;
- there was a zone of about two kilometres around the border area that was ploughed daily to show up any footprints made by possible border offenders;
- as well as the two kilometre zone, there was a border area of 30 km, where, despite the presence of villages, a visit was allowed only by special permit;
- anyone present in the border areas without the necessary permits and documents, even without attempting to cross the border, ran the risk of being shot by the military guarding the border.

Given these deterrents to border-crossing from the East, it is easy to see that West Europeans had a different perspective. Even before the start of the transition process, crossing the western border of the socialist block was a privilege reserved only to those most loyal to the party.

The borders between the socialist countries themselves had lower thresholds. Moreover, as all countries belonged to a common friendly block, there was no serious attempt to resolve border disputes or to deal seriously with minority issues. As a result, in several places the border cut through areas with common ethnicity and separated single communities (as with the Hungarian/Romanian border, Polish/Ukrainian border, etc.). This development can explain the sentiments related to

the eastern border of the socialist countries, most of which had simplified rules for crossing and inevitably the feeling of a 'friendly border' was generated.

Moving further east, some of the new Member States, the three coming from within the then Soviet Union did not have an external land border, but they were also heavily militarized at the coast line.

5.2. The value of free movement

The second significant difference in perception between the new and the old Member States is undoubtedly the value placed on the free movement of persons.

5.2.1. Free movement in the West

As was demonstrated earlier, since the establishment of the EC, the free movement of persons was initially a concept that grew from the free movement of workers. This freedom was to be further extended to include various groups of persons. However, in essence it is in fact linked more to the residence of nationals of one EC Member State wishing to work in another state rather than to a simple procedure to cross borders, and was thus a process of entry regulation.

One of the reasons for such a perception of movement is that by the time the EEC Treaty was signed, citizens of most of the European countries benefited from some kind of simplified access procedure, at least with their neighbours and in most cases with a number of other countries. In addition, in three more geographically limited areas there was already a process of setting up passport unions, which simplified travel procedures even further for citizens of the participating states. To sum up, by the beginning of the 1960s, the average Western European citizen could move around the continent without encountering too many formalities. Visa requirements among most of the countries (Spain, Portugal and Greece excluded) and border crossings were allowed only on the basis of a passport or even in some instances on the basis of a national identity card.

Despite the relative liberty achieved, most of the policy-makers at the time had personal memories of the movement limitations imposed by the authoritarian state – namely by Nazi Germany during the World War II. This might have been one of the reasons for the huge number of initiatives aimed at the further liberalization of travel in the 1960s and 1970s (see for example the Passport Union proposed in 1974). Free movement carried not only practical but also symbolic value for them, and in combination with the growing economy and the need for immigrant workers, an environment of liberal immigration policies and movement regulation emerged.

By the mid-1980s this state of affairs had changed significantly.

Fuelled by three interlinked factors, the approach of the EC changed dramatically at the beginning of the 1990s. With the fall of the Berlin Wall came the fear of mass immigration from the East. There was a period of mass asylum crises, followed by economic difficulties in some of the Member States. All these resulted in a move towards the closing off of the EU; liberalizing through the Schengen rules inside but closing off from outside.

Undoubtedly, the EU's migration policy in general and the policies linked to border controls and visas are considered to be quite restrictive at present. The way in which visa lists are composed and visa exemptions are granted is an expression of that fear of immigration. Countries with a tradition of immigration (e.g. US, Canada and Australia) usually take a different approach. For them the main focus of visa policy is on immigration visa (which by and large do not exist in Europe) and about channelling immigration (see also chapter 10.1).

5.2.2. Free movement in the East

Unlike Western citizens, and unlike the situation before World War II when they enjoyed a similar level of free movement throughout Europe, the citizens of Eastern Europe had an experience of almost complete control over movement by the state.

It was mentioned earlier that any travel abroad was limited by the need for a passport and the need for an exit visa. However, the passport for travel abroad (as the internal identity documents were also called passports) were issued not to everyone who applied but only to those who met certain conditions. Moreover, once the trip for which the passport was issued was completed, the passport was supposed to be returned to the issuing authority. In addition to having a passport, there was also a need for an exit visa, especially for travel to Western Europe. Thus the number of trips made was necessarily limited.

Apart from the total regulation of trips abroad, there was also control over movement within the country. Every citizen had a permanent residence and did not have the right to change it without the permission of the authorities.[61]

Such total control over population movements led to the development of a special attachment and value for the concept of free movement in the East. As it was a right refused for decades, there was a natural reaction to defend it, to help it develop further and not to refuse it to others.

6. Conclusions

This chapter analyzed the loss of sovereignty for the new member countries on their road to EU membership and then full integration into the Schengen area. The old Member States had decided (in the protocol of Amsterdam on the integration of the Schengen *acquis*) that any new members had to take on the full Schengen *acquis* without the possibility of transition periods. This created problems for many new Member States, which had sometimes only recently acquired full control over their territories and who wished to keep their borders open to stabilize, and in many cases to facilitate contact with, minorities living in third countries. The candidate countries thus resisted the loss of sovereignty, also because for them sovereignty and the freedom to travel within their own part of Europe represented important political

[61] For a historical review of the regulation in Bulgaria, see GUENTCHEVA, "From Banishment to Ascribed Residence: Controlling Internal Movement in Socialist Bulgaria (1944-1989)", paper presented in the project "Roles, Identities and Hybrids" of the Centre for Advanced Study, Sofia, May 2006, available at http://v3.cas.bg/cyeds/downloads/From_Banishment_to_Ascribed_Residence.pdf

values, which was sometimes poorly understood by the old member countries, whose experience of borders had long been unproblematic.

CHAPTER 8 – IMPACT AT EU LEVEL I – COMPASSIONATE PARTNERS AND THE EU'S REACTION TO CONCERNS OF THE NEW MEMBER STATES

Even before the accession date of 2004, there was an understanding on the part of the EU of the need to address the concerns of the then candidate countries about possible problems with their neighbours upon accession.[1] The hope on both sides of the future external borders was to achieve visa liberalization, grounded in the visa-free regime the neighbours enjoyed with the new Member States, using as a model the experience of Bulgaria and Romania in achieving visa-free status.

This was never seriously considered by the European Union, however, despite the insistence of both the new Member States and their neighbours at the political level. The stance taken by the EU was not influenced by the unilateral measures to abolish visas for EU nationals adopted by certain states, most notably Ukraine. Instead, the EU pursued a piecemeal approach; trying to tackle each problem individually, thus creating additional fragmentation in an already fragmented field.

After 2001 when the new EC visa regulation entered into force, three new specific legal tools were developed: i) special travel documents for Kaliningrad, ii) special rules for local border traffic and iii) visa facilitation (special procedures for the issuance of Schengen visas).

Some temporary measures covering the period between accession to the EU and accession to Schengen to ensure the recognition of the Schengen visas for entry onto the territory of the new Member states were also adopted (but they are not the subject of this study).

The first two are most clearly a response to the problems raised by the Eastern enlargement. Both these case proposals were made prior to the 1 May 2004 accession

[1] This is documented in detail for each of the cases considered in this chapter.

date and were aimed at resolving very specific and technical problems arising at the external land border of the EU as a result of the Eastern enlargement. Neither would have been necessary if a general visa-free arrangement had been possible to accommodate the special relationships of the new Member States. Both have important implications for the way in which external competence is exercised and for the tensions arising as a result of the transfer of sovereignty in the visa field by the new Member States to the EU. Both also show a tendency towards the generation of regulation at community level of issues of special interest to the new Member States, but of marginal importance to the old ones. A field that was previously a shared competence between the EU and the Member States was transformed into a field of exclusive EU competence, thereby limiting the possibilities for action by the individual Member States concerned. The background to this was clearly a lack of trust among member countries.

Visa facilitation, the third special measure developed in response to enlargement, seems destined to become a more general policy tool for the Union, but it is still too early to judge its relevance.

Part I – KALININGRAD

Among the many cases of special relations with neighbours and the potential problems associated with enlargement, the case of the Kaliningrad[2] deserves special attention. Due to its geographical situation and the fact of it being an enclave surrounded by two EU Member States, it poses special challenges quite different from concerns in the other regions of the EU external land border. The Commission Enlargement Strategy Paper of November 2000 already called for the issues concerning Kaliningrad, in co-operation with Russia, Poland and Lithuania to be addressed.[3] These issues included security, economic and political concerns, and the movement of persons, to be addressed in this chapter.

In the following pages an analysis of the arrangements related to enlargement for Kaliningrad will be studied, from the point of view of EU visa policy and the movement of third-country nationals. The analysis consists of four main parts. In the first, the general background of Kaliningrad will be presented. In the second, the main problems linked to enlargement will be outlined. An analysis of the legal mechanisms chosen to solve the problems then follows. And finally, an analysis of the present situation and possible remaining challenges linked to the Schengen accession of the neighbouring Kaliningrad to EU Member States will be presented.

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[2] Here and elsewhere in the text Kaliningrad is used to refer to the Kaliningrad Region. References made to the city of Kaliningrad are identified as such.

[3] The problems of Kaliningrad, associated with the Eastern enlargement of the EU, gave rise to many conferences and publications in the period 2001 – 2003, aiming to elaborate an innovative solution of the Kaliningrad problem. Among those, see BAXENDALE, DEWAR AND GOWAN (eds), The *EU and Kaliningrad: Kaliningrad and the Impact of EU Enlargement*, Federal Trust for Education and Research, (London, 2001), 288 p.; FAIRLIE AND SERGOUNIN, *Are Borders Barriers?: EU Enlargement and the Russian Region of Kaliningrad*, Ulkopoliittinen Instituutti and Institut für Europäische Politik, (Helsinki and Bonn, 2001), 190 p.; R. J. KRICKUS, *The Kaliningrad question*, Lanham, Rowman & Littlefield , (Oxford, 2002), 221 p.; LAMANDE AND LEFEBVRE, "Un nouveau mur pour Kaliningrad?", *Courrier des pays de l'Est*, Le Centre, n. 1025, (2002), pp. 39-49; PETERMANN ET MATAGNE, "Cahier n° 1 – The EU Enlargement and Russia: The Case of Kaliningrad", *Cahiers de Sciences politiques de l'ULg*, (2002), available at: http://popups.ulg.ac.be/csp/document.php?id=65; HUISMAN, "A new European Union policy for Kaliningrad", *Occassional Papers*, n. 33, European Union Institute for Security Studies, Paris, (2002); TIMMERMANN, "The EU-Russia Minuet over Kaliningrad", *Internationale Politik*, Volume 4/2003 Spring, German Council on Foreign Relations (DGAP), Berlin, (2003); and a series of articles on Kaliningrad by EVEGENY VINOKUROV, among which VINOKUROV, "Transit is just a part of it: Kaliningrad and the free movement of people", *Association of International Experts on the Development of the Kaliningrad Region*, (2004), all available on: http://www.vinokurov.info.

1. General background

The Kaliningrad Region is a Russian enclave bordered by Poland, Lithuania and the Baltic Sea. It is detached from mainland Russia and geographically included in the EU while remaining under Russian sovereignty. It has a land surface of 15,100 square km and a population of almost one million inhabitants, of whom about 430,000 are concentrated in the capital, Kaliningrad.

During the Soviet period, the main concerns of the West towards Kaliningrad were linked to security and its role as home port of the Russian Baltic fleet. Kaliningrad became an exclave of Russia, separated from what is called mainland Russia, when in 1991 the Soviet Union dissolved and Belarus and the Baltic States became independent. As of that moment, travel by land between Kaliningrad and mainland Russia involves crossing three borders; crossing the borders of Lithuania and Latvia or Lithuania and Belarus or Poland and Belarus. In 1999 there were 8.6 million border crossings by land to the two neighbouring countries (with a population in Kaliningrad of less than 1 million).[4]

The accession negotiations of Poland and Lithuania would eventually lead to Kaliningrad becoming a Russian enclave within the enlarged EU. Considering that the acceding states are expected to adopt unconditionally the Schengen *acquis* and thus also introduce visa requirements, the residents of Kaliningrad need a visa to leave the region (the Russian term for this administrative unit is oblast) even if they are travelling to mainland Russia. The 2000 EU Commission report on Lithuanian progress towards EU accession stated: "Lithuanian policy in respect of simplification of the visa regime for border residents of Belarus and Kaliningrad is not in line with the common visa policy and will need to be revised before accession."[5]

[4] FAIRLIE AND SERGOUNIN, *Are Borders Barriers?: EU Enlargement and the Russian Region of Kaliningrad*, Ulkopoliittinen Instituutti and Institut für Europäische Politik, (Helsinki and Bonn, 2001).

[5] 2000 Regular Report from the Commission on Lithuania's progress towards accession, COM (2000) 707 final, 8 November 2000, page 84. Poland was expected to require visas by the end of 2001 and Lithuania by 2003.

In 2001, when the EU and Russia finally engaged in a dialogue aiming at finding solutions for the Kaliningrad problem, the Commission presented a Communication on this issue[6] outlining the main challenges.[7]

Of the neighbours of Kaliningrad, Lithuania is the main trading partner and an important investor in the region. It is located on the transit route between the region and the Russian mainland. It has the largest share of visitors and transit traffic from Kaliningrad and wants to maintain good relations with Russia, to ensure that Kaliningrad is not isolated and does not become a source of economic or political instability. Lithuania and Russia established an institutional basis for cooperation through bilateral agreements on Kaliningrad (1991, 1999). As far as Poland is concerned, cooperation exists between certain Polish regions and Kaliningrad. Activities mainly consist of partnerships and exchanges at the local level (SMEs, academic institutions, administrations), but also cover the preparation of investment projects.

During the Soviet period, people from Kaliningrad travelled freely within the USSR. Since the break-up of the USSR, they have to travel some 500 km through Lithuania and either Latvia or Belarus in order to get to the rest of Russia. The same applies to other Russians who want to visit their relatives, friends and business partners in Kaliningrad. The Russian authorities estimated that in 2001 the total number of crossings between Kaliningrad and the rest of Russia was 960,000 by train and 620,000 by car (Kaliningrad's population is 950,000).

As far as rules on travel are concerned, Lithuania had a special regime for travel related to Kaliningrad. First of all, the transit via the territory of Lithuania was visa-

[6] Communication from the Commission to the Council, "The EU and Kaliningrad", COM (2001) 26 final, 17 January 2001.

[7] The Communication presented the difficult economic realities in Kaliningrad: "The economic data for 2001 shows that due to the economic problems of transition, Kaliningrad households have come to rely increasingly on unregistered economic activities. As a border province, Kaliningrad offers much scope for informal activity, estimated to account for more than 50% of GDP. About 10,000 people are believed to be involved in regular cross-border shuttle trading. Thirty percent of the population is now estimated to live below subsistence level. There is only one regular international flight from Kaliningrad, to Copenhagen and thus most of the movement of persons is realised by land and to a lesser extent by sea. In 2001 Kaliningrad had 23 international road, rail, air and sea border crossing points, on most of which the border crossing formalities are slow and hamper the contacts with neighbouring countries."

free and available not only to the inhabitants of Kaliningrad but also to certain categories of Russian citizens transiting through Lithuania. Secondly, there was a special regulation for the residents of Kaliningrad, allowing them to visit Lithuania itself visa-free. And finally, all those movements, although in legal terms taking place over international borders, were allowed on the basis of internal identity documents, instead of the customarily required valid passport.

Map 8.1. Map of Kaliningrad

Source: The CIA World Fact Book.

2. Main problems linked to enlargement

The problems linked to the movement of persons from Kaliningrad to the surrounding states (Poland and Lithuania) and their transit to Russia have a temporal and geographical dimension.

When the EU and Russia started discussing the issue in 2001, there was a need to come up with a solution for three time periods, each of them subject to different legal rules.

1) A first period from the introduction of visas for Russian nationals by Poland (in 2001) and Lithuania (in 2003) until the respective accession of both countries to

the EU (2004). During this period, previously existing bilateral visa-free or facilitated traffic arrangements would not apply (some of them would have been denounced in the process of negotiations for membership) but neither would any EU or Schengen rule apply.

2) A second period spanned from the date of accession to the EU of Poland and Lithuania to the date of accession to Schengen of both countries. During this period, the new countries would still issue their national visas, following their national rules. Moreover, the internal border controls between their territory and the territory of the other Member States would not be lifted.

3) A third period covered the date of accession to Schengen of Lithuania and Poland (2007), leading to the full application of the Schengen rules in the countries surrounding Kaliningrad.

The geography of Kaliningrad gives rise to three problems for human mobility. The first is the movement of the inhabitants of Kaliningrad towards Poland and Lithuania and later towards the Schengen area. The second is the problem of local border traffic, where persons living in the border area regularly cross the border for economic, social or cultural reasons. The third problem is linked to the transit between Kaliningrad and the rest of Russia. Added to this is the complication over travel documents, as under any new travel scheme, requiring a valid international passport would necessitate the issuing of passports to significant numbers of the Kaliningrad population.

During internal EU discussions on ways to tackle these problems, the argument was raised that of all the three problems outlined above, the only one whose situation was peculiar to Kaliningrad was the problem of transit to Russia.[8] The problems over the movement of citizens of neighbouring EU states to Schengen territory and the problems of local border traffic were clearly not specific to Kaliningrad as they applied across the new external land border. Thus, the legal action at EU level concentrated on the development of special measures for the transit of Russian nationals both from and to the enclave of Kaliningrad, while the issues of local border traffic and how to generally facilitate travel were dealt with later through acts of a

[8] For arguments and ideas, see the Note from the French Delegation to the Visa Working Party of 27 February 2002, Council doc. 6694/02.

more general application (see Part II on local border traffic and Part III on visa facilitation of this chapter).

3. Legal mechanisms used to address the problem

3.1. Lithuania and Poland

A joint statement[9] made in the context of the EU-Russia Summit on 3 October 2001 called for an examination of the special situation of Kaliningrad in the context of enlargement, and the official discussions continued through 2002 until February 2003 when the Commission submitted a proposal for two Council Regulations, meant to resolve the issue at least until the expansion of the Schengen area (and the respective lifting of controls on the internal borders between Poland and Lithuania and the other EU Member States).

By September 2002, the general discussion had gone along the lines of seeking a solution related to transit only to and from Kaliningrad to mainland Russia. On 18 September 2002 the Commission published another communication to the Council, this time concentrating exclusively on transit.[10] The legal situation surrounding the negotiations and the implementation of whatever agreement was reached, was additionally complicated by the fact that in effect the EU was negotiating transit through a territory that was, at the time, not part of its territory. There were parallel negotiations between the EU and Russia and, at the same time between the EU and Lithuania and Poland, the latter taking place within the framework of accession negotiations.

Once the issue under discussion became confined to transit only, the involvement and interest of Poland decreased, as it did not consider itself a transit country between the different parts of Russia. Thus, based on its previous practice of allowing only those Russian citizens with international passports, it opted for the introduction of visas (for Russian citizens) as of 01.7.2003.

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[9] EU-Russia Summit. Brussels, (2001, October 3) "Joint Statement", point 9, available at: http://www.delrus.ec.europa.eu/en/images/pText_pict/238/sum41.doc

[10] Communication from the Commission to the Council, "Kaliningrad: Transit", COM (2002) 510 final, 18 September 2002.

As for Lithuania, its treatment of Russian citizens in general in 2003 and Kaliningrad residents in particular was as follows. Lithuania required visas (normally issued by consulates on the basis of international passports) for all car passengers from mainland Russia. No visa was required for rail passengers or truck drivers. Visas for these categories were introduced as from 1 January 2003 and Kaliningrad residents stayed visa-exempt until 1 July 2003. However, the problem of most Kaliningrad inhabitants not holding international passports remained. According to the Lithuanian legislation of the time, only a passport valid for international travel could be accepted for crossing the border, unless an international agreement stipulated otherwise. At the time, residents of Kaliningrad (but not Russians from the mainland) could use internal Russian passports to cross the border. The Commission's view on the possible continuation of this practice upon accession was positive, as it stated in its communication that:

> there is nothing in the *acquis* that would prevent Lithuania from accepting the internal passport for crossing its territory (with a visa attached to a separate sheet in accordance with Regulation 333/2002) before the lifting of internal border controls, if deemed necessary in cases where Russians travelling to and from Kaliningrad do not yet have passports valid for international travel.[11]

3.2. EU level

On 14 March 2003, the Council adopted two regulations, following the proposal of the Commission: Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual,[12] and Council Regulation (EC) No 694/2003 on uniform formats for FTD and FRTD.[13] Both regulations were adopted on the basis of Art. 62(2) following consultation with the European Parliament.

[11] Communication from the Commission to the Council, "Kaliningrad:Transit", op. cit., para 14.
[12] O.J. 2003, L 099, pp. 8-14.
[13] O.J. 2003, L 099, pp. 15-21.

The objective of this measure is clearly stated in paragraph 1 of the Preamble:

> in order to prepare accession of new Member States, the Community should take into account specific situations, which might occur as a result of the enlargement and set out the relevant legislation in order to avoid future problems in relation with the crossing of the external borders.

What is meant by "specific situations" here is those third country nationals who need to cross the territory of one or several Member States to travel between two parts of their own country that are not geographically contiguous. Despite the general wording of this part, the preparatory documents clearly indicate that the only case where such rule has any practical reference is the case of Kaliningrad. However, both regulations have a rather general wording and there is no mention of Kaliningrad at all in their text.

As for the wording chosen for the documents: facilitated transit document (FTD) and facilitated rail transit document (FRTD), despite their formal titles, they "have the value of transit visas authorising their holders to enter in order to pass through the territories of Member States in accordance with the provisions of the Schengen *acquis* concerning the crossing of the external borders".[14] Why the term "transit visas" was not used became clear during the discussions on the newly proposed Visa Code. It seems that during the negotiations, the Russian side was strongly opposed to any reference to transit visas when setting up a scheme allowing Russians to travel from mainland Russia to Kaliningrad (and vice versa).[15] The reason for this sensitivity might have been that, according to the EU rules on visas, a transit visa is defined as a visa allowing transit through the Schengen territory from the territory of one third state to the territory of another, and thus does not cover the cases when the movement is from the territory of one state to another part of the same state.

It is interesting that both regulations were drafted in such a way that they did not address the points of EU concern at the time. Indeed, the regulations were adopted by

[14] Recital 4 of the Preamble of Council Regulation No 693/2003, op.cit. The equivalence to transit visas is also mentioned in Article 3(1) of Council Regulation No 693/2003, op.cit. and Article 1 of Council Regulation No 694/2003, op.cit.

[15] See Council doc. 13611/06, 6 October 2006, Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas, p. 3.

the Council the same day as the Council took the decisions on the admission of the ten new Member States to the European Union.[16]

Thus in this period, the EU negotiated special provisions for movement through a territory that did not fall under its sovereignty and was unlikely to do so before the lifting of the internal border controls between the old and new Member States. Paragraph 14 of the preamble of the Council Regulation 693/2003 clearly states that it "constitutes an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession and will therefore only become applicable after the lifting of the internal border controls". This of course leaves open the question of what EU rules were applicable to the transit between Kaliningrad and Russia between 2003 and 2007 (the accession of Poland and Lithuania to Schengen). In view of the fact that the Regulations were not applicable to Lithuania, who had the control over movement while the EU (or rather its Schengen part, to which the Regulations are applicable) did not have a territory on which to apply them. Moreover, what application did the Commission report on on 22.12.2006?[17]

In fact, Regulation 693/2003 sets out the basic principles for the functioning of the FTD/FRTD scheme. The practical details were established in a bilateral agreement on the procedure of issuance of FRTDs between the Russian Federation and Lithuania of 20.6.2003 and Regulation N 361, adopted by the Russian Federation, on measures aimed at the fulfilment of engagements under taken by the Russian Federation under the Joint Statement of the Russian Federation and the EU on transit between the Kaliningrad oblast and the rest of the territory of the Russian Federation.[18]

Article 12 of Council Regulation 693/2003 provides that Member States deciding to issue the FTD and the FRTD shall communicate such a decision to the Council and the Commission. Such decisions are to be published by the Commission in the

[16] Decision of the Council of the European Union of 14 April 2003 on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union, O.J. 2003, L 236.

[17] Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russian Federation, COM (2006) 0840 final.

[18] Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russian Federation, op. cit., part II.

Official Journal and enter into force on the date of the publication. After the entry into force of the first such decision, the Commission is under obligation to report to the European Parliament and the Council on the functioning of the facilitated transit scheme, at the latest three years after the entry into force of the first decision. Following these rules, Lithuania communicated to the Council and to the Commission its decision to apply the FTD/FRTD scheme from 1 July 2003, thus putting the Commission under obligation to report by 1 July 2006.

However, at the time of the notification, Lithuania was not an EU member state and even after it acceded the two Council regulations still did not apply (but the bilateral agreement between Russia and Lithuania did apply), until the lifting of internal border controls and the full integration of Lithuania in Schengen in 2007.[19]

It is clear that Lithuania was torn between its desire for EU membership and the need to maintain good relations with its neighbours. Both these objectives led to agreements containing rules that could have jeopardized the future integration of Lithuania in Schengen, however. To counter such fears, a special Protocol No 5 to the Accession Treaty was drawn up.[20] Article 1 of the Protocol contains a guarantee that the agreed rules on transit "shall not in themselves delay or prevent the full participation of Lithuania in the Schengen *acquis*, including the removal of internal border controls". Article 2 contains an obligation on behalf of the Community to assist Lithuania in the implementation of the rules and shall "notably bear any additional costs incurred by implementing the specific provisions of the *acquis* provided for such transit".[21] And most importantly, Article 3 states that:

> Without prejudice to the sovereign rights of Lithuania, any further decision concerning the transit of persons between the region of Kaliningrad and other parts of the Russian Federation will be only adopted after the accession of

[19]See Council Decision 2007/801/EC of 6 December 2007 on the full application of the provisions of the Schengen *acquis* in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, O.J. 2007, L 323, p. 34–39.

In accordance with the Council Decision, the land and sea internal border controls were lifted on 21 December 2007 and the controls on internal flights on 30 March 2008.

[20] Protocol No 5 on the transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation, O.J. 2003, L 236, p. 946.

[21] Indeed a special "Kaliningrad Transit Scheme" is included as a special part of the general programme "Solidarity and Management of Migration Flows" in the Financial Perspective 2007-2013.

> Lithuania by the Council acting unanimously on a proposal from the Commission.

Thus the sovereign rights of Lithuania were recognized politically by establishing special decision-making rules that deviate from the standard decision-making rules in this field that would normally call for a QMV, after 1 May 2004. Any change of the status quo would require the consent of Lithuania. In this sense, the country could not be overruled within the EU decision making mechanism on this matter.[22]

3.3. Consequences in relation to the two-phase implementation procedure of acts building upon the Schengen acquis.

The accession treaty contains an article stipulating that the provisions of the Schengen *acquis*, the acts building upon it or otherwise related to it, listed in the annex to that Article, shall be binding on and applicable in the new Member States as from accession. The provisions and acts not referred to in that annex, while binding on the new Member States as from accession, will only become applicable in the new Member States following a special Council decision to that effect, made in accordance with that Article.

The Council Regulation on a uniform format for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) are added to the annex of the article in the Accession Treaty, consistent with the fact that all other acts related to the uniform format of travel documents are listed in that annex, and thus become applicable upon accession.

The annex to the Article in the Accession Treaty does not contain any acts related to the definition, the validity, the issuing procedures, and the conditions for obtaining travel documents. The Council Regulation introducing a specific Facilitated Transit Document (FTD) and a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual is not listed in that annex and, while binding on all Member States, will only become applicable in the new

[22] However, this is not equivalent to full national sovereignty since the EU rules remain in place and Lithuania is bound by them even if changing circumstances were to require a change in order to safeguard the interests of Lithuania.

Member States following a Council decision to that effect. Until such a decision, facilitated transit remains a matter for national regulation. As a consequence, the other Member States do not have to recognize the facilitated transit documents until the adoption of the second Council Decision lifting the internal borders.

4. The substantive rules on FTD and FRTD

The regime, in place since 1 July 2003, introduced two new types of document needed for transiting through Lithuania to and from mainland Russia: the Facilitated Transit Document (FTD) and the Facilitated Railway Transit Document (FRTD).[23]

4.1. Facilitated Transit Document

The purpose of the FTD is to facilitate the crossing of Lithuania either by car or by bus. The FTD is issued by Lithuanian consulates in Russia for a period of one year and is free of charge for all Russian citizens.[24] The procedures for acquiring an FTD are much like normal visa procedures.

Poland is not concerned by the FTDs and applies its normal visa regime for Kaliningrad residents. As far as Poland is concerned, it introduced visas for Russian citizens on 1 October 2003, as a direct consequence of its forthcoming EU accession. Poland initially intended to introduce visas already on 1 July (as Lithuania did), but postponed this measure for three months so as "not to disturb the tourist season". A reciprocal visa regime was established with Russia with a specific non-reciprocal element for Kaliningrad. According to the agreement, Kaliningrad residents may receive Polish visas free of charge, whereas people from mainland Russia have to pay

[23] For details on the operation of the regime see the Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russian Federation, COM (2006) 0840 final, Brussels, 22 December 2006, as well as VINOKUROV, "Transit is just a part of it: Kaliningrad and the free movement of people", *Association of International Experts on the Development of the Kaliningrad Region*, (2004); and International Organization for Migration (IOM), "Kaliningrad transit: secure borders, free movement", *IOM Lithuania*, (2007).

[24] The rules cover citizens and not residents of Russia. The vocabulary used in the texts of the two Council Regulations makes that clear. Recital 2 of Council Regulation (EC) No 693/2003 speaks about "the new situation of third country nationals who must necessarily cross the territory of one or several Member States in order to travel between two parts of their own country which are not geographically contiguous". Article 4 of the same Council Regulation lists among the conditions for issuing FTD an applicant shall meet, having "valid reasons for frequent travelling between the two parts of the territory of his country".

regular consular fees. Polish citizens have to pay for their Russian visas unless they are travelling to the Kaliningrad oblast. However, Russians did not need transit visas to cross Poland on the way to Germany or further afield, as long as they had a valid Schengen visa.[25]

The FTD is issued to Russian citizens travelling frequently by land from the Kaliningrad region to the mainland and vice versa. It allows for multiple-entry transit and can be valid for up to several years. The application procedure at the consular office is similar to the visa issuing procedure. The FTD is affixed in the international passport of the Russian national, and the price is fixed at €5.

4.2. Facilitated Railway Transit Document (FRTD)

The FRTD was created for rail passengers and is valid for direct transit between Kaliningrad and the Russian mainland for a single return transit (entry-return). An FRTD is valid for a return trip within three months, which means that there is no need to apply for and receive a new document in order to return. A second stamp is put on the back of the FRTD. The issuing procedure is facilitated and offered without charge.

The FRTD can be issued to persons going through Lithuania only on Russian transit trains. There are two such train routes at present – to Moscow and Saint-Petersburg. The procedure is as follows. When buying a ticket, a traveller must submit his/her basic passport data, which are then transferred to the Lithuanian consular authorities electronically. There is a time limit of 26 hours in which to buy train tickets before departure. After boarding the train, a form has to be filled out. Shortly before the border, a Lithuanian consular official goes through the train, collects the forms and distributes FRTDs to the passengers.

There are various limitations on the issue of FRTDs. For example, citizens of the CIS other than Russia need transit visas to travel through Lithuania into Kaliningrad.

[25] Based on the Decision No 895/2006/EC of the European Parliament and of the Council of 14 July 2006 introducing a simplified regime for the control of persons at the external borders based on unilateral recognition by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of certain documents as equivalent to their national visas for the purposes of transit through their territories, O.J. 2006, L 167, p. 1.

Russian citizens need transit visas in order to transit Lithuania on non-Russian trains. These are issued at the Lithuanian embassy in Moscow and in consulates at a cost of €10 and require one week to process, or €35 if urgent. Russian citizens must be in possession of an international passport in order to obtain this visa.

For those Russian citizens intending to make single or return trips by train through the territory of Lithuania, FRTD can be obtained on the basis of personal data submitted at the time of ticket purchase. This information is forwarded in electronic form to the Lithuanian authorities, who will respond within 24 hours. Tickets are not issued by the Russian authorities if Lithuania has objections to the transit of these Russian citizens via Lithuanian territory. An FRTD is then delivered by the Lithuanian consular authorities to the passenger at, or before, the Lithuanian border once Lithuania has checked that the travel documentation carried by the passenger is in order.[26]

According to Regulation 693/2003, a Russian citizen wishing to travel by train with an international passport should receive an FRTD affixed to his passport. The bearer of Russian internal passports would however receive an FRTD affixed on a separate sheet as set out in Regulation 333/2002. From 1 May 2005 Russian nationals were required to have an international passport to which the FRTD sticker can be affixed. Bearers of an FRTD would not alight in Lithuania and the duration for each transit would be limited to 6h per transit.

5. Evaluation of the application of the rules – and remaining challenges[27]

By 2006 the number of persons travelling annually from and to Kaliningrad was estimated at 1.5 million,[28] which is far fewer than before, but still a rather high number given that Kaliningrad's population numbers slightly less than 1 million.

[26] Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russian Federation, COM (2006), Brussels, 22.12.2006, page 3

[27] Several organizations were engaged in the evaluation of the way the transit scheme was working. See for example, International Organization for Migration (IOM), "Kaliningrad transit: secure borders, free movement", IOM Lithuania, (2007); and for a more recent assessment see GAENZLE, MUENTEL AND VINOKUROV (eds), *Adapting to European Integration? The Case of the Russian Exclave Kaliningrad*, Manchester University Press, (Manchester, 2008).

[28] See the Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russia Federation, COM (2006) 840 final, Brussels, 22 December 2006.

The FTDs are mainly used by Russian nationals from mainland Russia. The majority of Kaliningrad Russian citizens travel with FRTDs. However, it is more convenient for them to obtain a Lithuanian visa that grants the possibility not only to travel in transit but also to visit Lithuania. The procedures to obtain these visas and the FTD are very similar but the FTD has a €5 fee while the Lithuanian visas for Kaliningrad residents were free of charge until 2008. This explains why the number of Lithuanian visas issued to Kaliningrad residents was two to three times higher than the FTDs.

The FRTD scheme has so far functioned smoothly. The millionth FRTD was issued on 3 March 2006 (after 32 months of operation). By contrast, the FTD has been less popular, as people prefer to receive full-scale multi-entry Lithuanian visas, which were initially free of charge to Kaliningrad residents. The situation changed however with the entry into force of the EU-Russia visa facilitation agreement,[29] which sets the price at €35 and does not foresee any exception for Kaliningrad residents. Starting in 2008 the situation changed again when Lithuania joined the Schengen free travel area and started to issue Schengen visas.[30]

The Commission sees the transit regime as an integral part of the Schengen *acquis* and therefore fully Schengen-compatible, so it does not see any major reason to change the present FTD/FRTD scheme.

Overall the border and transit issues constitute only part of the 'Kaliningrad problem', however. For Kaliningrad residents, Lithuanian transit is perhaps a lesser problem than travel in and out of the surrounding countries of Poland and Lithuania. Only about 1.5 million out of a total of 8.7 million border crossings in 2001 were for movement between Kaliningrad and the mainland.[31] It appears that the special rules for transit did succeed in limiting the impact of EU accession by the surrounding countries on the movement between Kaliningrad and Russia. However, the same

[29] Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, O.J. 2007, L 129, p. 27, entered into force on 1 June 2007.

[30] Somewhat surprisingly Lithuania, unlike Poland, did not massively increase the issuance of long term visas.

[31] VINOKUROV, "Kaliningrad's borders and transit to mainland Russia: practicalities and remaining bottlenecks", *CEPS Commentary*, February, (2004*)*, available at www.ceps.eu.

cannot be said of the access of Kaliningrad residents to the surrounding EU territory. This problem is not simply specific to Kaliningrad but to the entire new external land border.

The question remained: how could there be a more comprehensive solution to the problems of transit and visas for Kaliningrad? Clearly, a visa-free regime between Russia and the EU states would effectively remove the problem altogether. However, this is still a long-term prospect. Another option would have been to simply include the whole Kaliningrad region in the local border area of Poland and Lithuania.

As for Russia, the Kaliningrad regional Duma has twice offered to introduce a visa-free regime for EU nationals unilaterally. This proposal would be feasible technically, since Kaliningrad is detached from the mainland, but it was rejected by the Russian Ministry of Foreign Affairs on the basis of the principle of reciprocity and the indivisibility of the Russian state.[32]

6. Interim conclusions

The way in which a solution was found to the problems arising from EU enlargement, particularly in relation to Kaliningrad, is an interesting illustration of the tensions that can arise between a state transferring, or about to transfer, sovereignty and the entity that absorbs it. Despite the fact that the issue of transit from Kaliningrad to Russia was already subject to certain bilateral arrangements between Lithuania (a candidate country for EU membership at the time) and Russia, the EU felt the need to regulate the field even before the actual accession date. This constituted a sort of 'advanced loss of sovereignty' for a prospective member, mitigated, however, by the fact that the country concerned was fully involved in the relevant negotiations.

In 2003, before Lithuania became a member, the EU had already adopted two Regulations on 'facilitated transit', which are clearly applicable only to Kaliningrad. These legal acts transformed the conditions for transit into part of the *acquis* that Lithuania had to adopt upon accession (and to implement upon full integration into

[32] VINOKUROV, "Kaliningrad Visa and Transit Issues Revisited", *CEPS Commentary*, February, (2006), available at www.ceps.eu

the Schengen area). This action by the EU pre-empted any independent bilateral action by Lithuania on an important issue related to its territory, and this despite the fact that the country still had full sovereign control over this policy field, as these events happened four years before the full integration of the country into the Schengen area.

In reality, however, Lithuania's loss of sovereignty seems to have been limited. Had the regulations been negotiated and adopted one year later (i.e. in 2004[33]), Lithuania could have participated fully in the process as one of the 25 Member States. However, since the issue would have been decided under QMV, Lithuania would not have been able to determine the outcome of the negotiations anyway.

Moreover, Protocol 5 of the Accession Treaty provides an additional guarantee for the protection of Lithuanian interests in providing for a derogation of the general rules for the adoption of such measures (QMV) to unanimity. However, in order to exercise this right, a new proposal has to be made by the Commission and the discussion on the Regulation has to be opened again. And the interim report of the Commission on the implementation of the regime does not show any intention of such a revision.

Finally, the way in which the negotiations were conducted also raises certain questions. In effect, there were no trilateral negotiations but a system of bilateral negotiations. On the one side the EU was negotiating with Russia (on an issue which at the time of negotiation was not an EU concern and on which the EU could not guarantee any implementation).[34] The issue was then discussed with Lithuania (and to a lesser extent with Poland) during the accession negotiations (and in fact one of the Council documents only refers to the candidate countries as "being informed"). Also, whatever was agreed in the EU – Russian negotiations had to be transformed into a bilateral agreement between Russia and Lithuania, without leaving any leeway for

[33] Meanwhile the bilateral arrangement between Lithuania and Russia would continue to serve, which in any event would still apply until the full Schengen integration of Lithuania. The only other temporary factor that could have influenced the decision was the introduction of visas to Russian nationals, which was also planned for 1.7.2003. However, this could have easily been postponed to the date of accession, as was the case of some other then candidate countries and their neighbours (Bulgaria towards Macedonia and Serbia, Romania towards Ukraine, Malta towards Libya).

[34] This is correct from a legal point of view. But politically given the prospect of Lithuania becoming an EU Member and a Schengen state, some advance work of the EU was understandable.

real negotiations on the Lithuanian side, since the substance had already been agreed by the EU and Russia.

Part II – LOCAL BORDER TRAFFIC

Another area in which enlargement brought about important legal changes was the area of 'local border traffic'.[35] This had been of rather limited concern to the original Schengen group as its land border was generally quite open, with only one case (Switzerland) in which local border traffic with a non-member state constituted an important economic issue. However, enlargement meant a manifold increase in the length of the land border of the EU (and that of the Schengen area). Moreover, after enlargement the land borders were now with countries that were generally regarded as being a source of migrants and criminal activity. Local border traffic in Eastern Europe was and is of considerable economic importance and is widely seen as contributing to the economic and political stability of the weaker Eastern neighbours of the EU (e.g. Ukraine, Belarus, FYROM).

This part analyzes the legal developments in this field and shows how competence in this area shifted to the EU level, meaning the focus of the rules governing local border traffic changed from addressing purely practical issues concerning border crossings to the creation of substitutes for visas.

1. The beginning: The Commission proposal of 2003

The first proposal by the Commission concerning a comprehensive regime on local border traffic appeared in 2003.[36] Following the changes in the decision-making procedure at the end of the five-year period set by the Treaty of Amsterdam (1 May

[35] This issue is distinct from the specific Kaliningrad problem. During the discussion about the problems of Kaliningrad in 2001-2003, it was generally accepted that the only problem specific to Kaliningrad was the transit through Member States to mainland Russia. The remaining two concerns – that of the access of the local population to the territory of the surrounding states (and later Schengen) under conditions similar to the pre-enlargement regime (visa-free) and the problems of local border traffic were considered as problems of general importance as they were relevant also to the rest of the external borders of the Union, and thus were to be subject to general rules. Proposals for such rules concerning the second issue were not late in coming.

[36] COM (2003)502 – 2003/0193 (CNS), Proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States, 14 August 2003, and COM (2003)502 – 2003/0194 (CNS), Proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States, 14 March 2003.

2004), a new proposal was submitted in the course of 2005[37] and finally adopted and published in December 2006.

1.1. What is local border traffic?

Local border traffic is defined[38] as "the regular and frequent crossing of the border by persons residing in the border area of a neighbouring country". The term already appeared in the Schengen Convention of 1990 in Article 3, paragraph 1, where it is stated that exceptions to the obligation of crossing the external border at authorized border crossing points and during fixed opening hours can be envisaged in the framework of "arrangements for local border traffic" on the basis of rules to be "adopted by the Executive Committee". However for over ten years such rules were not adopted, either in the intergovernmental framework of Schengen or after the integration of the Schengen *acquis* into the legal and institutional framework of the European Union with the entry into force of the Amsterdam Treaty on 1 May 1999.

Thus the "Plan for the management of the external borders of the Member States of the European Union", adopted by the JHA Council on 13 June 2002 and subsequently endorsed by the Seville European Council of 21 and 22 June 2002 referred to the need to "identify principles and adopt common measures on local border traffic, **particularly with a view to enlargement**" and included the measures that needed to be taken in the short-term. The Commission outlined the existing situation at the time and the possibilities for regulation in a Staff Working Document of September 2002.[39]

The importance of the issue was recognized from the beginning due to enlargement, as cross-border movements between the then candidate countries, as well as between candidate countries on the one side and their neighbours on the other, are significant

[37] See Proposal for a Regulation of the European Parliament and of the Council, laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, COM (2005) 56 final, Brussels, 23 February 2005.

[38] See COM (2005) 56 final, Proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, Brussels, 23 February 2005, p. 2.

[39] Commission Staff Working Paper, "Developing the *Acquis* on 'Local Border Traffic'", SEC (2002) 947, Brussels, 9 September 2002.

in number. It was also acknowledged that having common rules could be beneficial for economic, social and cultural exchanges, while frontier workers are an important element of the economic development of the Member States. Still, the fact that for the period from 1990 (when the Schengen Convention was signed) until 2001 when the development of rules on "local border traffic" were acknowledged as a short-term priority, no common rules were developed and only the rules of bilateral agreements applied, suggests that the real impetus to developing this type of regulation was provided by the imminent enlargement.

1.2. Local border traffic in the enlarging EU

One reason was the fact that for the (then) candidate countries, local border traffic was for a number of political and economic reasons much more important than for the old member countries. For example, Eastern Europe contains many more instances of important cross-border minorities (e.g. Hungarian minorities in Romania, Slovakia and Serbia).

Another element was that all existing agreements until 2001, both involving EU Member States and the then candidate countries, were agreements between countries that already applied a visa-free regime.[40] Thus, the issue of local border traffic was much more significant in the context of border controls and was an exception to the usual procedure for conducting controls (crossing at places other than the authorized border crossing points, or outside the usual opening hours). However, after enlargement, the issue changed, as the rules on local border traffic would not only impact on border controls but also on visas, as they would provide an exception to the conditions citizens of countries on the visa black list should meet. In fact, they were designed to exempt border residents who benefited from the local border traffic from the visa obligation.[41] Even though recital 6 of the Regulation states that "local border traffic permits should be issued to border residents whether or not they are subject to visa requirements", the residents who did not need a visa would be able to enter and

[40] For a full list of the agreements and their main elements, see Annexes I and II of the Commission Staff Working Paper, op. cit.

[41] Recital 6 of Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, O.J. 2006, L 405, p. 1-22, hereafter "Local Border Traffic Regulation".

stay not only in the border area but also on the whole territory. Therefore, the system had practical effect only in cases where the neighbouring third country was subject to visa requirements.

It was thus not surprising that the Commission also mentioned in its proposals that any of the measures adopted in order to facilitate the crossing of the borders for "local border traffic" purposes, would have to take into account both the need to prevent illegal immigration and the potential threats to security posed by criminal activities. These two considerations bear a striking resemblance to two of the three criteria mentioned in the preamble of Regulation 539/2001, with relevance to determining the position of a third country on the white or black visa list respectively.[42]

Prior to enlargement certain some Member States and most of the then candidate countries had bilateral agreements on local border traffic. All those agreements at the time were concluded between countries which had mutual visa exemption arrangements; the main purpose of the agreement was thus the practical facilitation of crossing the border. Some countries provided for a special document issued to the residents in the border area, others accepted a simple identity card.[43]

Moreover, the Commission Communication on "Wider Europe" (COM(2003) 104 final, 11.3.2003), clearly stressed that both the EU and its neighbours had a common interest in ensuring that the new external border was not a barrier to trade, social and cultural interchange or regional cooperation.

2. Development of the proposal

The Commission introduced two proposals for Council Regulations in August 2003.[44] The two proposals were based on Article 62(2) of the EC Treaty ("measures on the

[42] The third criterion is reciprocity.

[43] For details on earlier bilateral local border traffic agreements, see Commission Staff Working Paper, "Developing the Acquis on 'Local Border Traffic'", SEC (2002) 947, Brussels, 9 September 2002; for the role of local border traffic in transfrontier cooperation, see Council of Europe, "Managing old and new frontiers of Europe: Transfrontier co-operation in regional/special planning, local border traffic and impact assessments", *Transfrontier co-operation*, No 7, Strasbourg, (1998), p. 11-12 and p. 18.

[44] COM(2003)502, on the establishment of a regime of local border traffic at the external land borders of the Member States, and COM(2003)502, on the establishment of a regime of local border traffic at the temporary external land borders between Member States. For details on the negotiations and an

crossing of the external borders of the Member States"), covering both "standards and procedures to be followed by Member States in carrying out checks on persons (Article 62(2)(a)) and the "procedures and conditions for issuing visas by Member States" (Article 62(2)(b)(ii)), including "rules on a uniform visa" (Article 62(2)(b)(iv)). In other words, of the three legal bases, one was related to border controls and the remaining two to visas.

As the discussions within the Council on these proposals proved very difficult, no progress was made before 1 May 2004. As of that date, measures based on Article 62(2)(b)(ii) and on Article 62(2)(b)(iv) could be adopted by the European Parliament and the Council in accordance with the co-decision procedure (Article 67(4)) thus requiring only QMV, not unanimity. Measures based on Article 62(2)(a) were still to be adopted unanimously by the Council after consulting the European Parliament.

According to the Commission, with the two procedures being incompatible, in accordance with a well-established case-law of the Court of Justice[45], it was no longer possible to have in the same proposal provisions relating to checks at the external borders, and provisions concerning the establishment of a specific visa issued to border residents on the grounds of local border traffic.

Thus, the Commission decided to draft two new proposals, namely:

1) a first proposal for a Council Regulation, based on Article 62(2)(a) (consultation procedure), laying down general rules on local border traffic, with the exception of the provisions introducing the specific visa;
2) a second proposal for a European Parliament and Council Regulation, based on Article 62(2)(b), points ii) and iv) (co-decision procedure) establishing a specific "L" visa to be issued for the purposes of local border traffic.

Adoption of these new proposals by the College was planned for December 2004. However, as a consequence of the adoption of "The Hague Programme" by the European Council of 4/5 November 2004, towards the end of 2004, the Council took

assessment, see L. CORRADO, "Negotiating the EU External Border", in BALZACQ AND CARRERA, *Security Versus Freedom? A Challenge for Europe's Future*, CEPS and Ashgate, (Aldershot, 2006).

[45] ECJ, Case C 300/89 *Commission v Council* [1991] ECR I 2867 ('Titanium dioxide'), paragraphs 17 to 21, see also, to that effect, Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139, paragraph 14; Case C-338/01 *Commission v Council*, paragraph 57; Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraph 52; and Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, paragraph 57

the decision to extend the co-decision procedure to certain areas covered by Title IV of the EC Treaty, including measures related to external borders.[46]

Consequently from 1.1.2005 both the external borders and the visa-related aspects covered by the two proposals on local border traffic (one on border-related aspects and a second one on the special 'L' visa) could be adopted under the same procedure, which allowed the two proposals to be merged into one. The Commission did this with its Proposal of February 2005 for a "Regulation of the European Parliament and of the Council, laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions".[47]

3. The main elements of the local border traffic regulation

After another round of laborious negotiations lasting almost two years, this time also involving the European Parliament, Regulation 1931/2006 was adopted on 20 December 2006. It laid down rules on local border traffic at the external land borders of the Member States and amended the provisions of the Schengen Convention.

Finally, the legal basis of the Regulation was limited only to Article 62(2)(a) EC and thus to "standards and procedures to be followed by Member States in carrying out checks on persons." The legal basis linked to the visa rules and the special types of visa were therefore dropped.

The essence of the regime that is now in force is the following.

[46] Council Decision 2004/927/EC of 22 December 2004, providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (O.J. 2004, L 396, p.45).

[47] Proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, COM (2005) 56 final, Brussels, 23 February 2005. See Annex 8.1 to Chapter 8 for a summary.

3.1. Purpose

The purpose of the Regulation is to establish Community rules on local border traffic at the external land border (a field which had hitherto been regulated by bilateral agreements and where there were no community rules). In addition, it will authorize the Member States to conclude or maintain bilateral agreements for the purpose of implementing the common regime. Ultimately, it aims to facilitate border crossing to border residents without creating loopholes affecting security. Each of these objectives is clearly elaborated in the preamble of the Regulation. Paragraph (1) underlines the need to develop rules on local border traffic in order to consolidate the Community legal framework on external borders. The second objective, clearly linked to enlargement, is outlined in paragraph (2) and states that "it is in the interest of the enlarged Community to ensure that the borders with its neighbours are not a barrier to trade, social and cultural interchange or regional cooperation" and thus an efficient system for local border traffic should consequently be developed.

The local border traffic regime is considered to be in derogation of the general rules governing the border control of persons crossing the external borders of the Member States, as established by the Schengen Border Code.[48]

The Regulation is to set criteria and conditions which the beneficiaries of the local border traffic are to meet. Such criteria and conditions are meant to ensure a balance between, on the one hand, the easing of border crossing for bona fide border residents having legitimate reasons to frequently cross an external land border and, on the other hand, the need to prevent illegal immigration and potential threats to security posed by criminal activities.

Similar language can be found in the agreements dealing with visa facilitation, which will be discussed in the next chapter.

[48] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, O.J. 2006, L 105, p. 1.

3.2. Definitions

"External land border" is defined as the common land border between a Member State and a neighbouring third country.
"Border area" is defined as an area that extends no more than 30 km from the border. However, under certain conditions it can be extended from 30 to 50 km when the administrative borders of a district extend beyond the 30 km and this exception is foreseen in a bilateral agreement regulating traffic.

"Local border traffic" is defined as the regular crossing of an external land border by border residents in order to stay in a border area, for example for social, cultural or substantiated economic reasons, or for family reasons, for a period not exceeding three months in every six months (the same as the period allowed for the holders of short-stay visas).

"Border residents" are defined as third-country nationals who have been lawfully resident in the border area of a country neighbouring a Member State for a period defined by a bilateral agreement but which should be at least one year. However, on the basis of a bilateral agreement, in certain cases this period can either be extended to more than one year or be shortened to less than that period.

3.3. Local border traffic regime

The regime created by the Regulation sets up specific conditions for the entry and stay of border residents. The entry conditions which border residents shall meet are:[49]

- to be in possession of a local border permit (or also of a valid travel document if this is required by a bilateral agreement);
- not be persons for whom an alert has been issued in the Schengen Information System (SIS) for the purposes of refusing entry; and
- not be considered a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no

[49] Article 4 of the Local Border Traffic Regulation, op. cit.

alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.

In what way are these different from the entry conditions envisaged in the Schengen Borders Code? The Schengen Borders Code provides that in order to be granted entry for a stay not exceeding three months per six-month period, third-country nationals must:

- possess a valid travel document;
- possess a valid visa, if required;
- justify the purpose of their intended stay, and have sufficient means of subsistence;
- not be a person for whom an alert has been issued in the SIS for the purposes of refusing entry;
- not be considered a threat to public policy, internal security, public health or the international relations of the Member States.

A simple comparison shows that in the case of local border traffic, the requirement linked to visas is replaced by the requirement for the special local border traffic permit; a valid travel document can be requested, but not necessarily, and there is no requirement to justify the purpose of the intended stay and sufficient means of subsistence. However, this latter condition is partially replaced with the condition for being a border resident and thus living in a border area for a period of at least one year. The duration of stay in the EU Member State is to be determined in each case by the bilateral agreements concluded by the Member States but should not exceed three months (a length of stay corresponding to the stay granted to the holders of short-stay visas).

The conditions of crossing are facilitated, in that checks on entry and exit are to be carried out but no stamping of the local border traffic permit shall take place (contrary to the obligation to stamp the passports of third country nationals on entry and exit). Article 15 foresees an additional easing of border crossing through: the setting up of specific border crossing points open only to border residents; reserving specific lanes to border residents at ordinary border crossing points; or taking into account of the local circumstances and where, exceptionally, there is a requirement of a special

nature to authorize border residents to cross their external land border at defined places other than authorized border crossing points and outside the fixed hours. There is also the possibility for persons who, due to their regular crossing, are well-known to the guards and are subject only to random checks.

3.4. Local Border Traffic Permit

The special visa type 'L' from the original Commission proposal in the final version of the Regulation has been transformed into a "local border traffic permit".

Its territorial validity is limited to the border area of the issuing Member States. In effect it resembles an identity document as it contains a photograph, name and residence of the holder, the issuing authority and the border area for which it is valid. Its characteristics do not resemble a visa. And indeed Article 8 states that as far as security and technical specifications are concerned, the local border traffic permit should rather follow those specifications related to the uniform format for residence permits for third-country nationals than the uniform format for visas.

However, the confusion surrounding the exact nature of this document increases with some additional characteristics, as the Regulation reveals.

As far as issuing conditions are concerned, apart from the conditions already mentioned in relation to entry, the border residents applying for the permit have to produce documents proving their status as border residents and proving the existence of legitimate reasons to frequently cross the external land border under the local border traffic regime. Thus, if compared to the requirements for the issuing of a visa, the need for legitimate reasons persists, but there is no requirement for sufficient resources. Possibly due to the proximity to the applicants' place of residence, s/he would not need to stay for longer periods on the territory of the Member States.

The validity of the permit is fixed at a minimum of one and a maximum of five years and the fee for its issue is not to exceed the fees charged for processing applications

for short-term multiple entry visas. However, there is a possibility to issue permits free of charge[50].

As far as the issuing authority is concerned, it can either be a consulate or any administrative authority of a Member State that has been designated in a bilateral agreement for its implementation.

Thus, ultimately the local border traffic permit is not a visa but it can be issued by consulates (as visas are); the costs for its issuing are the same as those for visas and it allows a duration of stay on the Member States' territory equal to the maximum stay allowed for holders of short-stay visas.

3.5. Implementation

In terms of the rules of implementation, the text finally adopted remains very close to the proposal from the Commission. However, there is one important change and an important addition. The change relates to the fact that the Regulation contains rules on bilateral agreements only, between Member States and neighbouring third countries. In the original Commission proposal, a separate article deals with cases of local border traffic agreements between two Member States. But this article does not appear in the final version. The important addition relates to readmission. In cases where no general readmission agreement is concluded with the third country in question, the Member State has to ensure that a readmission clause is included in the text of the bilateral local border traffic agreement.

As to the precise rules on the implementation of the Regulation, one should note again[51] that by adopting the Regulation, the competence related to local border traffic has been transformed into implied, exclusive external competence. As long ago as 1971 and as recently as 12 February 2009, the Court of Justice ruled that:

> each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting

[50] Article 11 of the Local Border Traffic Regulation, op.cit.

[51] See points 1 and 3 of Chapter 2.

> individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.[52]

Thus the Community's competence to conclude international agreements with third States in the areas covered by the Regulation is exclusive. From this it follows that the Member States may not, in principle, amend existing bilateral agreements and/or conclude new bilateral agreements with third states in these areas to the extent that they may affect the existing Community common rules or distort their scope. Where Community competence is exclusive, "Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules."[53]

In practical terms, however, it proved necessary to delegate the exercise of this Community competence to Member States because it became clear that it would be politically awkward for the Community to negotiate a local border traffic agreement which in the end would impinge on the important interests of only one Member State.[54] Moreover, the Member State concerned obviously knows the conditions of local border traffic much better. This is why it was necessary to find a way to distinguish between the existence of exclusive Community competence and its implementation.[55] In other words, under these exceptional circumstances it was necessary to envisage mechanisms for the exercise of the Community exclusive competence by the Member States (obviously provided that the uniformity and effectiveness of Community law is ensured). Such agreements can be scrutinised by ECJ on their compatibility with Community law under Articles 226 to 228 EC

There are a certain number of precedents to international agreements concluded by the Member States relating to matters in which the Community has exclusive

[52] Case C-467/98 *Commission* v. *Denmark* [2002] ECR I-9519, para 77; and Case C-45/07 *Commission* v. *Greece* [2009] ECR I-0000For a general review of the external competence in the field of visa policy, see Section 2 of Chapter 2 of this study.

[53] Case C-467/98, *Commission* v. *Denmark* [2002] ECR I-9519, para 82.

[54] This leads back to the question of when a matter becomes an issue for the EU as a whole.

[55] P. EECKHOUT, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law, General report", Topic 3, 22nd FIDE Congress, Limassol, Cyprus, 1-4 November 2006, p.279.

competence. One example is Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries[56]. Member States may conclude these agreements under the supervision of the Commission. On other occasions, the Council has already, in exceptional circumstances[57], authorized Members States to conclude international agreements in the interest of the Community in areas falling within the Community's exclusive competence.[58]

In this concrete case, the Local Border Traffic Regulation contains explicit provision that "Member States shall be authorised" to conclude bilateral agreements with neighbouring third countries in accordance with the rules set out in the regulation.[59] There are no detailed provisions as to the procedure that Member States shall follow when negotiating and concluding an agreement.[60] What is foreseen[61] is that before concluding or amending any bilateral agreement, the Member State concerned shall consult the Commission as to the compatibility of the agreement with the Regulation. If the Commission considers that the agreement is incompatible with the Regulation, it should notify the Member State concerned and the latter shall take all appropriate measures to amend the agreement within a reasonable period in order to eliminate the incompatibilities. As the wording of the text shows, the Commission is involved in the process only at the very last stage, namely prior to conclusion of the agreement

[56] OJ L 2004, 195, p.3

[57] See for example, Council Decision of 24.09.2001 on the conclusion on behalf of the Community of the International Coffee Agreement, O.J. 2001, L 326; Council Decision of 19 September 2002 concerning the International Convention on Civil Liability for Bunker oil Pollution Damage, O.J. 2002, L 256, p.7

[58] For further discussion on the character of the external competence in this field see B. MARTENCZUK, "Visa Policy and EU External Relations", in Martenczuk and van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations*, VUB Press, (Brussels, 2008), p. 21-52; and S. PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford University Press, (Oxford, 2006), p. 176.

[59] Article 13 (1) of the Local Border Traffic Regulation, op. cit.

[60] In contrast, see two proposals in the area of civil law, also authorizing Member States to conclude agreements in an area of exclusive Community competence but containing extremely detailed rules on the procedure and conclusion of the agreement. See: Proposal for a regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations, COM(2008)893, Brussels, 23 December 2008 and proposal for a Council regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations, COM(2008)0894,Brussels, 19 December 2008.

[61] Article 13 (2) of the Local Border Traffic Regulation, op. cit.

but not during the preparation and conduct of its negotiations. This is also evident in the wording used for the cases when incompatibility with the Regulation is detected. In this case, the regulation mentions "amending" the agreement, meaning that it is already signed, possibly concluded and even entered into force. In fact, in the case of the Polish-Ukraine agreement concluded on the basis of the regulation, the agreement was submitted for approval to the Commission after it had been initialled.[62]

Another interesting element related to the implementation of the agreement is the second paragraph of Article 13 (1), concerning cases in which Member States are also authorized to maintain existing bilateral agreements after ensuring their compatibility with the Regulation – following a procedure similar to the negotiations of new agreements. However, this provision could only apply to the 'old' Member States, as all 'new' Member States had already to denounce their existing bilateral local border traffic agreements as part of their accession process (mainly in the course of 2003).

However, a link to the 'old' Member States is ensured through Article 16 of the Regulation, which holds:

> The provisions of this Regulation shall not affect the specific arrangements applying to the towns of Ceuta and Melilla, as referred to in the Declaration by the Kingdom of Spain on the towns of Ceuta and Melilla in the Final Act to the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement.

Thus the continuous existence of the special arrangements which Spain negotiated at the time of its accession to Schengen is ensured.[63]

3.6. Reciprocity

The principle of reciprocity is also mentioned in the Regulation, though under the term "*comparability of treatment*". Article 14 provides:

[62] Polish Ministry of Foreign Affairs, "Communiqué on the initialling of the Agreement on the rules of local border traffic between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine", 03 March 2008, available at http://www.msz.gov.pl.

[63] See Chapter 4, in particular 4.3, for more details.

> In the bilateral Agreements referred to in Article 13, Member States shall ensure that third countries grant persons enjoying the Community right of free movement and third-country nationals lawfully resident in the border area of the Member State concerned treatment at least comparable to that granted to the border residents of the third country concerned.

3.7. Easing of border crossing

Another interesting element of the Regulation is that only a small part of the provisions on implementation deal with the easing of the actual physical process of crossing the border. This element used to be the *raison d'être* of all bilateral agreements on local border traffic. As the agreements at the time were concluded between countries whose citizens enjoyed visa-free travel, the purpose of the agreement was not to authorize access to the territory other than in accordance with general rules, but to facilitate the already legitimate access by simplifying the procedures when actually crossing the border.

This shows how the purpose and nature of the agreements have changed. The purpose of the agreements concluded with the Eastern neighbours of the EU is not only (perhaps not even mainly) to ensure a smooth border crossing but to make the crossing of the border actually possible. This is done by creating special rules that deviate from both the general visa rules and the general border crossing rules.[64] In essence, the new regime should facilitate access to the Eastern border areas of the EU for potentially millions of people living in the border regions of the neighbouring countries, by creating a quasi-visa document and thereby avoiding the need to discuss visa-free travel for all the citizens of the third countries concerned.

This issue is of considerable economic and political importance to the new Member States, which had in general allowed simple access to these territories until 2003, but this gradually became more and more difficult (procedurally and financially), first through the denunciation of the existing local border traffic agreements and the introduction of visa requirements to the citizens of the neighbouring countries, then through the introduction of Schengen visas for access to these areas.

[64] Only one article (Article 15) of 20 deals with the easing of border crossing.

3.8. Penalties for abuse

As there are no controls on persons at the limits of the internal local border area, the facilitation granted by this Regulation is in principle open to abuse. Holders of the local border traffic permit could travel unchecked to the entire Schengen territory. This is why the Local Border Traffic Regulation foresees sanctions. Article 17 provides:

> 1. Member States shall ensure that any abuse of the local border traffic regime, as established by this Regulation and as implemented by the bilateral Agreements referred to in Article 13, is subject to penalties as provided for by national law.
>
> 2. Those penalties shall be effective, proportionate and dissuasive and shall include the possibility of cancelling and revoking local border traffic permits.
>
> 3. Member States shall keep a record of all cases of abuse of the local border traffic regime and of penalties imposed in accordance with paragraph 1. That information shall be forwarded every six months to the other Member States and to the Commission.

This feature: the explicit inclusion of sanctions of abuse, is unique among the cases of facilitated cross border considered in this work.

4. The practice

According to Article 18 of Local Border Traffic Regulation No 1931/2006, by 19 January 2009, the Commission had to submit a report to the European Parliament and the Council on the implementation and functioning of the local border traffic regime.

The first such report was published by the Commission on 24 July 2009.[65]

The report shows that by July 2009, seven Member States (Hungary, Poland, Lithuania, Latvia, Slovakia, Bulgaria and Romania) had negotiated, or were in the process of negotiating local border traffic agreements, while Slovenia gave notice of an existing one with Croatia. A simple comparison with Table 7.4 in Chapter 7 shows

[65] Report from the Commission to the European Parliament and the Council on the implementation and functioning of the local border traffic regime introduced by Regulation (EC) No 1931/2006 of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States, COM (2009) 383 final, Brussels, 24.7.2009

that four of the seven countries mentioned above (Hungary, Poland, Latvia and Slovakia) had to denounce their earlier agreements, in some cases with the same third countries in the process of accession to the EU between 2000 and 2003. None of the EU15 states[66] have since shown any interest in the possibility provided by the Local Border Traffic Regulation.

The first three agreements to enter into force were the Hungary-Ukraine agreement (11 January 2008); the Slovakia-Ukraine agreement (27 September 2008) and the Poland-Ukraine agreement (1 July 2009). In all three cases, the Commission found the agreements to be in conformity with the Local Border Traffic Regulation, but it considered that the definition of the border area in all three agreements was incompatible with the Regulation, as it extended to over 50 km (more on this below). Despite the Commission opinion, both Hungary and Poland proceeded and concluded the agreements without correction of this incompatibility.

The data on the application of the agreements is also instructive. By January 2009, the Hungarian consulates in Ukraine had issued 34 000 local border traffic permits (about one year after the entry into force of the agreement). Around 80% of the applicants possessed a Hungarian visa previously. According to Hungarian sources, those who mainly use the possibilities of the agreement are members of the Hungarian minority in Ukraine, which, based on the 2001 census, amounts to 156 600 persons; 84% of whom live within 20 km of the Hungarian–Ukrainian border and 95% of whom live within a 50 km distance. This fact might explain the insistence on the 50 km border area on the part of Hungary.

In the case of the Slovakia-Ukraine agreement the numbers are much lower. By June 2009, (about 9 months after its entry into force) only 466 local border traffic permits had been issued.

Seven agreements are under negotiation: Lithuania-Belarus, Lithuania-Russia, Latvia-Russia, Poland-Belarus, Bulgaria-Serbia, Bulgaria-FYROM and Romania-Ukraine. Of these, two agreements (Latvia-Russia and Poland-Belarus) also contain provisions

[66] The EU Member States prior to the enlargement of 2004 and 2007.

for a border area going beyond the 50 km foreseen by the Local Border Traffic Regulation.

The experience to date shows that only a limited number of the facilitation measures foreseen in the Local Border Traffic Regulation are used in practice, namely:

- period of stay in the border area – 90 days within 180 days (equal to the stay allowed to the holders of a short term Schengen visa);
- minimum period of prior residence in the local border area for the granting of the local border traffic permit – set by the Regulation at one year but most of the agreements foresee a longer period – usually three years
- charge for issuing of the permit – one agreement provides for a free of charge issuance; most of the others foresee a fee of 20 to 35 euro (the latter is equal to the price of a visa under the visa facilitation agreements)
- Local border traffic permits may be issued for a period of validity up to 5 years – all but one agreement provides for such a possibility, which also exists for the short-term Schengen visas for multiple-entry.

The above overview illustrates the point made earlier, namely that the role the current local border traffic agreements play is that of a 'visa-replacing tool'.

The main difficulties encountered by the Commission to date also show the sovereignty related tension between the interests of the individual Member States and the margin for manoeuvre allowed to them by the Local Border Traffic Regulation. During the negotiations preceding the adoption of the Regulation, the new Member States favoured a 50 km border zone, precisely because the population they wished to cover lived within this range. However, this proposal was not adopted and instead a 30 km border area now applies. But the Member States are trying to extend that definition through the bilateral agreements that they negotiated. It remains to be seen whether their disagreement with the Commission (at the moment limited to the interpretation of the different linguistic versions of the Regulation) will eventually lead to an action before the Court of Justice. Any such case could be an interesting insofar as it clarifyies the limits of the authorization for the exercise of an exclusive EU competence granted to Member States.

The disagreement between the Commission and the Member States about the extension of the local border area arises from an ambiguity in Article 3(2) of the Local Border Traffic Regulation. This article reads, in English:

> "border area" means an area that extends no more than 30 kilometres from the border. The local administrative districts that are to be considered as the border area shall be specified by the States concerned in their bilateral Agreements, as referred to in Article 13. If part of any such district lies between 30 and 50 kilometres from the border line, it shall nevertheless be considered as part of the border area.

Here it is not clear whether the word "it" in the last line refers to the district chosen or to the part of the district within the 50 km line. With the former interpretation the local border area would effectively become 50 kilometres. However, the Commission argues that this was clearly not the intention of the legislator, who in principle wanted to limit the local border area to 30 kilometres. The Commission supports its line of argument with a reference to the French text, whose relevant part reads: "toute partie d'une de ces communes située à plus de 30 mais à moins de 50 kilomètres de la ligne frontalière est néanmoins considérée comme appartenant à la zone frontalière," which makes it clear that only the part of the district within 50 kilometres of the border may be regarded as part of the border area.

The arguments of the Commission seem convincing, but it remains to be seen whether it will choose to submit this matter to the Court.

5. Interim conclusions

Local border traffic agreements were a normal part of the legal landscape of Europe before 2004. Such agreements existed between EU Member States, as well as between acceding states and other third countries. As they were always concluded between states with reciprocal visa-free travel agreements, their focus was always on simplifying the process of physically crossing the border by providing special facilities.

With the intensification of the cooperation related to borders and visas in Europe, first through the Schengen agreement and then within the framework of the EU, the legal

possibility for common rules on local border traffic agreements were provided for (see Article 3, paragraph 1 of the Schengen Convention). However, for the thirteen years from 1990 (when the Schengen Convention was signed) to 2003 (when the first Commission proposal was presented) there were no initiatives on this subject.

The timing and contents of the first Commission proposal strongly suggests that the factor stimulating the development of the *acquis* in this field was the imminent enlargement and its effect on the person-to-person contacts on the EU's future external land border. In effect, due to the EU common visa policy and the requirement for the compulsory adoption of the Schengen *acquis* by all acceding states, millions of people who had previously benefited from the local border traffic agreements could no longer do so. As part of the accession process, all acceding states had to denounce their pre-existing local border traffic agreements. What is more, on the accession date of 1 May 2004, visa requirements, which did not previously exist, were also imposed on the same border population. The practical effect of this measure was that now a resident in a Ukrainian border region had to travel several hundred kilometres to Kiev in order to obtain a visa to visit the neighbouring Polish region – situated just 30 km away.

Thus, the EU had to respond to new realities. Local border traffic was no longer a question of simplifying border crossings; it became a question of visa policy. The proposal of the Commission had more to do with what document would allow access to EU territory of the third country's border region residents, than the actual conditions of crossing. This observation is further strengthened by the fact that from the 21 articles of the Regulation, only one deals effectively with the easing of border crossings. Instead, what the Regulation does is establish a quasi-visa document for access of residents in the border area of the third country to the border area of the EU Member State.[67] There are, of course, no controls on persons at the limits of the relevant border areas within Member States. Hence, as in the other cases of flexible application of Schengen visa rules discussed elsewhere in this work, the facilitation for local border traffic requires a minimum level of trust. To date no significant abuse

[67] The quasi-visa character of the document is confirmed by the position expressed by the Commission in its first report on the implementation and functioning of the local border traffic regime, op.cit., where it suggest that the visa facilitation agreements can be used as an alternative to the local border traffic regime in cases of third country citizens who do not fall in the defined border area.

has been reported, but as shown above, the Regulation already foresees penalties and a monitoring of abuse by Member States.

Did the Eastern enlargement of the EU have an impact on the proposal and the adoption of this Regulation? Undoubtedly, and this fact is stated clearly in the recitals of the Regulation with the necessary reference to the Seville European Council conclusions. It is doubtful, however, whether such a measure would have been proposed without the imminent enlargement and the complications related to the access to territory that this implied, especially at the external land border. After all, the possibility was there for decades but was never used.

One of the reasons for not adopting common rules in this field could be the effect such an adoption would have had on the external competence of the Member States. Without the Local Border Traffic Regulation, the competence to conclude such agreements belonged to the Member States and they had little interest in communitarizing yet another field that could lead to a limitation of their territorial sovereignty. However, the enlargement changed this logic, as it made communitarization preferable to the status quo.

Local border traffic was of little political importance to the old Member States, as with the expansion of the EU and the Schengen area, the external land border moved farther and farther away and the only agreements with practical effect remained those with Switzerland and even there, the issue was not so much allowing access as improving the physical conditions for access, which was in principle granted anyway.

However, the situation of the new Member States was completely different. They had to denounce their own agreements already in 2003 (in fact the year when the first proposal was made) and still had to ensure access to their territory for their neighbours' citizens, and even in some cases their minorities' members living in the neighbouring third countries.[68]

[68] See I. PIORKO, "Justice and Home Affairs aspects of the European Neighbourhood Policy, Wider Europe Programme", *Sussex European Institute*, (Sussex, 2005), available at http://www.wider-europe.org/files/UkraineandENPPiorko.pdf.

Without common rules, what would have prevented the new Member States from concluding new local border traffic agreements? Would those be compatible with the Schengen *acquis*?

Thus, the communitarization of the field of local border traffic through the Local Border Traffic Regulation had several important effects on the relations between the EU Member States and the Commission, between new and old Member States and between the new Member States and the neighbouring states on the external land border.

First, the development of a local border traffic regime allowed a field of marginal importance for the old Member States but of considerable importance for the new ones to fall under the scope of EU law. Probably due to lack of trust, the old Member States felt more secure in having the field under the control of the Commission than leaving the new Member States the possibility to regulate this area as they saw fit. Thus, the Commission played the role of trust-enhancer.

Second, through the communitarization of the field, the role of the Commission increased further. Although the Member States are authorized to implement the regulation through bilateral agreement, there is nothing to prevent the EU from exercising this competence itself.

Thirdly, the development of the Regulation also responded to the demands of the new Member States and the new neighbours on the external land border. By creating the possibility for a local border traffic movement, it created the impression of resolving the existing practical problem of lack of access to EU territory, but in reality this was not the case.

The old local border traffic agreements were denounced in 2003. After that, and especially after the accession date of 1 May 2004, all third-country citizens of the neighbouring countries needed a visa to make local border trips. After the accession to Schengen on 25 December 2007, the same persons now needed a Schengen visa to make the same trip. At that point in time, there was still not a single local border traffic agreement under the new Regulation in force.

Once the agreements are in force (or at least the ones that are concluded) they have the potential to give local border traffic permits to about 1.5 million Ukrainians based on the estimates of the EU Member States that concluded agreements with Ukraine. These permits will be valid for up to 5 years and will allow a stay of up to 90 days in any 180 and thus will serve as quasi-visas. The only difference with a visa will be the territorial validity and the cost. The sanctions for abuse of the system are also the same; expulsion and a ban on entry to the territory.

Thus, after six years of EU legislative activity and numerous bilateral negotiations, the legal situation of the residents of the border regions of the EU is back to where it was in 2003, regulated by bilateral local border traffic agreements. Only that the terms of these agreements were not decided by the individual Member States concerned but were determined by all Member States and the EP in the framework of the co-decision. Thus a formerly sovereign right of each Member State was transferred to the European level due to the lack of trust between old and new Member states and the general fear of illegal immigration from the East following the 2004 enlargement.

The Local Border Traffic Regulation is one of the examples to be found in European law of implied external competence of the Community being exercised by the Member States.

From the wording of the respective article of the Regulation, it is clear that the external competence can be exercised by the Member States through the conclusion of bilateral local border traffic agreements. But can it also be exercised by the Community itself?

An interesting case could arise when one of the EU Member States (say Estonia) proposes an agreement on local border traffic to Russia, which it is reluctant to accept due to some unresolved border disputes or simply due to foreign policy considerations. Under these circumstances, can the EU conclude an agreement with Russia covering all of common borders (respectively with Poland, Lithuania, Latvia, Estonia and Finland)? In principle, this seems to be legally possible, as by adopting the regulation, the competence on issues related to local border traffic has been

communitarized. However, although legally possible, it might not be practically possible for political reasons (the fact that the EU would be regulating the border traffic through its members' borders) or a lack of interest on the EU side (the Russian viewpoint in this hypothetical case might be more interested in concluding one instead of five local border traffic agreements).

From a practical and political point of view the issues arising here (as well as those in the part dealing with Kaliningrad) are similar to those that arose in the case of Portugal allowing visa-free access to citizens of Brazil.[69] In all these cases the interests of other Member States, and hence the EU, are affected only to the extent that the facilitation of entry does not spill over into their own territories.

[69] See chapter 4.2.

Part III – VISA FACILITATION AGREEMENTS

The third important legislative development designed to respond to the concerns of the new Member States is the rapidly developing field of visa facilitation. It is a field that lies at the intersection of three community policies – external relations, justice and home affairs and enlargement, and the interaction among them has shaped the development of this new tool.

Even before the accession date of 1 May 2004, there were concerns on both sides of the new external border about the possible disruption to cross-border contacts as a result of the introduction of visa requirements by the new Member States towards their neighbours. Visa facilitation was developed to address this concern, but its impact seems to have been limited, at least compared to the considerable legal apparatus that had been developed.[70] However, it appears that this tool (visa facilitation) is increasingly used in relation to many other countries, which are neither neighbours nor potential members.

1. The context - at the crossroads of three policy fields

We shall now analyze the development of visa facilitation as it evolved separately in three policy fields – external relations (European Neighbourhood Policy), justice and home affairs and enlargement.

1.1. European Neighbourhood Policy (ENP)

For a while an acknowledgement of visa liberalization as a possible solution was made in the first strategy documents of the European Neighbourhood Policy.[71] The December 2002 Copenhagen European Council confirmed "the Union's determination to avoid new dividing lines in Europe and to promote stability and

[70] Also compared to what had been demanded by the new neighbours, namely a visa-free regime with their neighbours, following conditionality similar to the one applied to Bulgaria and Romania before their removal from the visa black list in 2001.

[71] For a detailed analysis of visa facilitation agreements in the context of the European Neighbourhood Policy, see BONIFACE, WESSELING, O'CONNELL, AND RIPOLL SERVENT, "Visa Facilitation versus Tightening of Control: Key Aspects of the ENP", *Policy Department External Relations*, European Parliament, February, (2008).

prosperity within and beyond the new borders of the Union". In its "Wider Europe" Communication[72] of 2003, the Commission stated that the EU and the partner countries "have a common interest in ensuring the new external border is not a barrier to trade, social and cultural interchange or regional cooperation".[73] In the sub-part of the Communication entitled "Perspectives for lawful migration and movement of persons", several measures for achieving the aim defined above were outlined. Those measures included:

- an efficient and user-friendly system for small border traffic;
- ways of facilitating the crossing of external borders for bona fide third-country nationals living in the border areas that have legitimate and valid grounds for regularly crossing the border and do not pose any security threat;
- facilitating the movement of citizens of neighbouring countries participating in EU programmes and activities;
- granting of visa-free access to holders of diplomatic and service passports;
- examination of the wider application of visa-free regimes;
- conclusion of readmission agreements.

This first official document demonstrates the general directions in which possible solutions for the emerging visa problem can be found. Although the word "facilitation" is already mentioned here, its meaning is not what has finally come to be the core of "the visa facilitation agreements". Here the facilitation is aimed at a concrete group of travellers, those living in the border areas and the conditions attached to it are ultimately closer to the "local border traffic" arrangement rather than to general visa facilitation. There is also an exception for the diplomatic and service passports. As far as visa liberalization is concerned, a certain willingness is demonstrated in the wording to examine the conditions for that.

[72] Communication from the Commission to the Council and the European Parliament, "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", COM (2003) 104 final, Brussels, 11 March 2003.

[73] Communication from the Commission to the Council and the European Parliament, "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", op. cit., p. 11.

In the Strategy Paper[74] on the European Neighbourhood Policy published one year after the Communication, in 2004, the idea of visa facilitation is developed further. In the sub-part dedicated to Justice and Home Affairs, the Communication states that "the ENP aims to avoid new dividing lines at the borders of the enlarged Union."[75] In the context of border management, "the goal should be to facilitate movement of persons, whilst maintaining or improving a high level of security". Here the link between facilitated movement and security is explicitly established. At that point in time the proposal for Regulations on the establishment of local border traffic regime was alreadt under discussion. Thus, the mention of visa facilitation is this time more general, simply stating that: "the EU may also consider possibilities for visa facilitation". However, the reciprocal element is underlined, as "facilitation by one side will need to be matched by effective actions by the other". In addition, the readmission element appears again as "the Action Plans should also reflect the Union's interest in concluding readmission agreements with the partner countries".

In its next Communication from the Commission on Strengthening the European Neighbourhood Policy,[76] the Commission acknowledges that:

> the ENP has not yet allowed significant progress on improving the movement of partner country citizens to the EU." "The length and cost of procedures for short-term visas (e.g. business, researchers, students, tourists or even official travel) is a highly "visible" disincentive to partner countries, and an obstacle to many of the ENP's underlying objectives.[77]

How to overcome this weakness is developed further in the proposals to strengthen the policy. In Part 3.2 dedicated to Facilitating mobility and managing migration, the Commission goes further in its analysis:

> The Union cannot fully deliver on many aspects of the European Neighbourhood Policy if the ability to undertake legitimate short-term travel is as constrained as it is currently. Yet our existing visa policies and practices often impose real difficulties and obstacles to legitimate travel…The ability to obtain short-term

[74] Communication from the Commission, "European Neighbourhood Policy – Strategy paper", COM (2004) 373 final, Brussels, 12 May 2004.

[75] Communication from the Commission, "European Neighbourhood Policy – Strategy paper", op. cit., p.17.

[76] Communication from the Commission to the Council and the European Parliament on "Strengthening the European Neighborhood Policy", COM (2006) 726 final, Brussels, 4 December 2006.

[77] COM (2006) 726 final, op. cit., p. 3.

> visas in reasonable time at reasonable cost will be an indicator of the strength of our European Neighbourhood Policy.
> An enhanced ENP will therefore require a very serious examination of how visa procedures can be made less of an obstacle to legitimate travel from neighbouring countries to the EU (and vice versa)… This can only be addressed in the context of broader packages to address related issues such as cooperation on illegal immigration, in particular by sea, combating trafficking and smuggling in human beings, efficient border management, readmission agreements and effective return of illegal migrants, and adequate processing of requests for international protection and asylum… But with a solid commitment from our partners to work on these prerequisites, it should be possible to offer very substantial improvements on the visa side – providing simpler and faster visa procedures for certain specific categories of travel, particularly for business, official and educational purposes – at the same time as we strengthen our joint efforts against illegal immigration.
> Visa facilitation agreements are negotiated back-to-back with readmission agreements and are "tailor-made", responding to the specific needs of the third country concerned and provide simplification of the short-term visa issuing procedures for certain categories of persons… Taking account of the need for a balanced approach and building on the dialogue on migration and visa issues foreseen in the ENP Action Plans, the Union should be willing to enter negotiations on readmission and visa facilitation with each neighbouring country with an Action Plan in force, once the proper preconditions have been met. [78]

The action points proposed include "visa facilitation, removing obstacles to legitimate travel, e.g. for business, education, tourism, official purposes, as part of a package approach ensuing well-managed mobility and migration, addressing readmission, cooperation in fighting illegal immigration, and effective and efficient border management."[79]

1.2. Justice and Home Affairs (JHA)

The issue of visa facilitation is addressed from a different angle in the domain of justice and home affairs.[80]

The Hague Programme of 2004 raises the prospect of a wider application of visa facilitation but does so explicitly in the context of readmission policy by asking the Council and the Commission "to examine, with a view to developing a common

[78] COM (2006) 726 final, op. cit, p.5.

[79] COM (2006) 726 final, op. cit.

[80] For an analysis of visa facilitation and readmission agreements see TRAUNER AND KRUSE, "EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood", *CEPS Working Document*, No 290/ April, (2008); and TRAUNER AND KRUSE, "EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?", *European Journal of Migration and Law*, 10, (2008), pp. 411-438.

approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third country nationals, where possible and on the basis of reciprocity, as part of a real partnership in external relations, including migration-related issues".[81] The issue is also present in the Action Plan of 2-3 June 2005 implementing The Hague Programme, as an item for action.

However, one should note that the link between visa facilitation as an incentive for the conclusion of a readmission agreement had not been officially established earlier and in fact was practised only for specific countries. Negotiations on EC readmission agreements began as early as 2001[82] but progressed slowly, mainly due to the EC requirement that the third country should take back not only its own citizens but also third country nationals who had entered EU through their territory. It is difficult to argue that visa facilitation was designed from the beginning as a 'bargaining chip' to induce third countries to sign readmission agreements. Of all the countries with which negotiations for readmission agreements were started, visa facilitation was coupled with readmission only in the cases of Russia, Ukraine and Moldova (from the outset, the negotiating mandates for both agreements were presented together), all three of which are part of the Eastern dimension of the European neighbourhood policy and the Western Balkan countries (also negotiating mandates for both agreements given together), all of which are on their way to EU accession. Of the remaining countries negotiating readmission agreements (Algeria, Morocco, Turkey, China and Pakistan) or having already concluded one (Hong Kong and Macao), none has so far received a visa facilitation agreement as an incentive; although some, such as China and Algeria have requested it.

This sequence of events suggests that what motivated the visa facilitation agreements with the EU Eastern neighbours and the Western Balkan states was not so much the

[81] Council of the European Union, "The Hague Programme: strengthening freedom, security and justice in the European Union", JAI 16054/04, Brussels, 13 December 2004, p.18.

[82] In 2001, negotiations started with Hong Kong, Macao, Russia, Sri Lanka, Morocco and Pakistan, in 2002, with Ukraine; in 2003 with Albania and Turkey; in 2004, with China; in 2005 with Algeria; in 2006, with Bosnia, Macedonia, Montenegro, Serbia; and in 2007 with Moldova, For an analysis of the impact of the readmission agreements, see KRUSE, "EU Readmission Policy and Its Effects in Transit Countries – The Case of Albania", *European Journal of Migration and Law*, 8(2), (2006), pp. 115-142.

desire to conclude readmission agreements but rather to provide a temporary solution to the difficulties faced by the neighbours following the EU Eastern enlargement.

This logic might be changing, however, as the idea of linking readmission and visa facilitation gains ground for future exports to other regions. For example, this was the case for the mandate recently given by the Council for negotiation of visa facilitation and readmission agreement with Cape Verde, a country not in line for EU accession, nor a member of the ENP group, but a party in the Migration Partnership scheme. This intention was stated by the then European Commissioner Franco Frattini in 2006, who said that the EU will seek to enhance its internal security "through global visa facilitation and readmission agreements aimed in longer term at the Union's neighbourhood countries, on the model currently being developed in the Balkans."

1.3. Enlargement

The third policy field engaged in the issue of visa facilitation agreements, especially with regard to the Western Balkan countries, is that of enlargement. Following the first visa facilitation agreement with Russia, agreements were negotiated and initialled with all Balkan countries falling in the groups of candidates or potential candidates.[83] In this context visa facilitation was seen as a concrete step forward along the path set out by the Thessaloniki agenda towards a visa-free travel regime, also for the citizens of Western Balkan Countries.

On 18 September 2007, the visa facilitation agreements between the European Community and the Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, Serbia and Macedonia) were signed and thus the first step on the long road toward visa liberalization was taken. As the Commissioner for enlargement, Olli Rehn noted: "Now we expect proper implementation of both agreements, so as to pave the way for a dialogue on visa-free travel and its conditions with each of the countries of the region".[84]

[83] Croatia is the only country from the region (until December 2009) that benefits from visa-free access to the EU.

[84] EU press releases IP/07/1350, "Signature of nine agreements on visa facilitation and readmission between the European Community and all Western Balkans Countries", 18 September 2007.

Along with the visa facilitation agreements, readmission agreements with the same countries (apart from Albania, which already has such an agreement in place) were also signed, outlining clear obligations and procedures as to when and how to take back people who are illegally residing on the territories covered by the agreement. According to the Commission, the effective implementation of the Visa Facilitation and Readmission Agreements will ensure a better management of the migration pressure and will make it possible to envisage a structured dialogue along the path set out by the Thessaloniki Agenda towards a visa free travel regime also for the citizens of Western Balkan countries.[85]

The Thessaloniki Agenda clearly states[86] that the progress towards the liberalization of the visa regime is dependent on implementing major reforms in several areas, among which are combating illegal migration and strengthening the administrative capacity in border control and the security of documents. Moreover, in this process, "the EU should also encourage the transfer of the experience" of the acceding and candidate countries to their Stabilization and Association Process neighbours".

Visa facilitation is meant to encourage the Western Balkan countries to implement relevant reforms and reinforce their cooperation at regional level and with the EU in areas such as strengthening the rule of law, fighting organized crime and corruption, and increasing their administrative capacity in border control and security documents, by introducing biometric data.

2. The contents

2.1. The Common Approach on Visa Facilitation[87]

In response to the mandate given by The Hague Programme, the High Level Working Group on Migration and Asylum (HLWG) prepared a draft for a Common approach on visa facilitation, which was submitted to COREPER in November 2005.

[85] Ibid.

[86] The General Affairs and External Relations Council Conclusions, "Thessaloniki agenda for the Western Balkans: Moving towards European Integration", 16 June 2003, Annex A, p. 6.

[87] Common approach on visa facilitation, retrieved from www.libertysecurity.org

The logic behind the proposal is to "avoid a piecemeal response based exclusively on pressure from third countries" and thus to develop a common approach based on priorities and differentiation.

Firstly, the common approach defines visa facilitation as a "simplification of visa issuing procedures for nationals of third countries who are under visa obligation" and thus is quite distinct from visa liberalization, which would entail lifting the visa requirements as such.

The range of countries which can potentially benefit from visa facilitation is outlined on p.2 of the common approach and includes: candidate countries, countries with European perspective (possibly means potential candidates), countries covered by the European Neighbourhood Policy and strategic partners (meaning Russia, but could in theory include other countries). The decision to open negotiations is based on a "case-by-case assessment of the third countries".

The readmission policy is also mentioned as a priority area for the EU. Thus, point 4 of the common approach states that "in principle, visa facilitation agreement would not be concluded if no readmission agreement were in place". However, this does not mean that each country that has concluded a readmission agreement would automatically be eligible to open negotiations on visa facilitation agreements. Thus, having a readmission agreement with the EU is a necessary but not sufficient condition for the visa facilitation negotiations. The common approach even encourages the conclusion of readmission agreements to be linked, not only to visa facilitation, but to other instruments of a political, economic, commercial or developmental nature, in order to achieve the conclusion and implementation of a readmission agreement.

The factors influencing the decision to open negotiations for a visa facilitation agreement are enumerated in point 6. However, the list is not exhaustive. The factors influencing the decision are:

- whether a readmission agreement is in place, under negotiation, or is to be negotiated;

- external relations objectives;
- implementation record of existing bilateral agreements and progress on related issues in the area of justice, freedom and security (e.g. border management, document security, migration and asylum, fight against terrorism, organized crime and corruption);
- security concerns
- migratory movements
- impact of the visa facilitation agreement.

The substance of the agreements is expected to vary, depending on:

- the visa policy of the country concerned,
- the introduction of biometric passports, and
- existing practical problems.

As a result, there is a differentiation in substance meant to ensure that each agreement is tailored to the specific situation and requirements of a third country.

The negotiations are also based on the principle of reciprocity.

The relationship between the EU and Member States actions in the field is dealt with in point 9, stating that a Community visa facilitation agreement takes precedence over any bilateral agreement between one or more Member States and the third country in question, in so far as the provisions of the latter cover provisions dealt with by the Community agreement.

There is to be an inclusion of a monitoring mechanism and suspension clause in case of difficulties in respect of implementation or unexpected political developments.

Before a negotiation mandate is proposed, the Commission is supposed to consult the Member States both in JHA and geographical Council groups, and subsequently carry out exploratory talks with the third country concerned. These talks are meant to allow the Commission to gather the necessary technical information about a third country's visa system in order to elaborate the negotiating directives. To ensure coherence

between the JHA concerns and external relations concerns, both JHA and geographical working groups should prepare the negotiating directives.

2.2. First results, legal basis and scope of validity

The mandate for the negotiations of the first visa facilitation agreement, the one with Russia, was given in July 2004. By January 2008, there were already eight EC visa facilitation agreements in force.

Table 8.1. EC Visa Facilitation Agreements in force as of end 2009

Country	**Negotiation Mandate**	**Start of Negotiations**	**End of Negotiations**	**Entry into force**
Russia	July 2004	June 2005	May 2006	June 2007
Ukraine	November 2005	November 2005	October 2006	January 2008
Albania	November 2006	November 2006	November 2007	January 2008
Bosnia and Herzegovina	November 2006	November 2006	November 2007	January 2008
Macedonia	November 2006	November 2006	November 2007	January 2008
Montenegro	November 2006	November 2006	November 2007	January 2008
Serbia	November 2006	November 2006	November 2007	January 2008
Moldova	December 2006	February 2007	November 2007	January 2008

Legal basis. The legal basis for the conclusion of all of these agreements is Article 62 (2) (b) (i) and (ii); those are the provisions dealing respectively with "the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement" and "the procedures and conditions for issuing visas by Member States".

In terms of procedure, the legal basis is the first sentence of the first subparagraph of Article 300(2) (Commission negotiates following a mandate from the Council) and the first subparagraph of Article 300 (3) (consultation of the EP).

External competence. The agreement is a Community agreement and not a mixed agreement, following the AETR doctrine of external competence and the fact that the competences in this field have already been exercised by the Community and thus, by occupying the field, it has made the competences exclusive by exercise. Therefore,

there was no need to go for a mixed agreement, so the ratification was also performed by the Community and not following national procedures.

Of course visa facilitation could only cover short-term visas as the Community competence only extends to visas issued for a validity of up to three months, also called uniform visas or "Schengen visas", because these visas allow border-crossing and circulation in the whole Schengen area. Long-stay visas, i.e. visas for stays exceeding three months are national visas issued by each Member State in accordance with its national law.[88]

The basic rules on the conditions and procedures for issuing Schengen visas are laid down in the Common Consular Instructions (CCI).[89] The CCI allows for certain flexibility when visas are issued, i.e. issuance of multiple-entry visas for a long period of validity (up to five years) or reducing checks when the applicant is known to be a *bona fide* person in the framework of local consular cooperation. There is a possibility for waiving or reducing the visa fee, in individual cases, when this measure serves the promotion of cultural interests, foreign policy, development policy or other areas of vital public interest or for humanitarian reasons. The individual Member States can make use of this flexibility.

Visa facilitation agreements simply provide a common framework whereby the possible flexibility in the existing Schengen system is spelled out in specific exceptions, which can be then used by the beneficiaries of the scheme.

Scope. The agreements apply to all Member States with the exception of the United Kingdom, Ireland and Denmark.[90] All agreements contain two joint declarations respectively concerning the United Kingdom and Ireland and Denmark, which take note that the agreements do not apply to the procedures for issuing visas by the diplomatic and consular posts of these countries, but that it is desirable that the

[88] As shown in chapter 1.3 long term visas are issued in much smaller numbers. The concluding chapter comes back to this issue in the context of the Lisbon Treaty, which opens the possibility of EU regulation for long term visas as well.

[89] O.J. 2005, C 326, p. 1.

[90] See for example, recital 5 and 6 of the Council Decision 2007/821/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Albania on the facilitation of the issuance of visas.

authorities conclude, without delay, a bilateral agreement on the facilitation of the issuance of short-stay visas in similar terms to the agreement between the European Community and the respective third country.

As far as Iceland and Norway are concerned, in a Joint Declaration present in all agreements, note is taken of the close relationship between the European Community and Norway and Iceland, particularly by virtue of the Agreement of 18 May 1999 concerning the association of these countries with the implementation, application and development of the Schengen *acquis*. In terms similar to the Joint Declarations on the United Kingdom and Ireland and Denmark, the desirability of conclusion without delay of the bilateral agreements on visa facilitation is underlined.

There is another specificity related to the Member States that do not fully apply the Schengen rules (at present only Bulgaria and Romania). These countries are bound by the Schengen *acquis* but do not yet issue Schengen visas; they therefore issue national visas, the validity of which is limited to their own territory.

2.3. The contents

The contents of the visa facilitation agreements in force by June 2009 will be briefly compared. Those include the agreements with Russia,[91] Ukraine[92] and Moldova[93] in the East and five countries in the Western Balkans – Albania,[94] Bosnia and Herzegovina,[95] Macedonia,[96] Montenegro[97] and Serbia.[98] As the agreements do not

[91] Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, Official Journal L 129/27, 15 May 2007.

[92] Agreement between the European Community and Ukraine on the facilitation of the issuance of visas, O.J. 2007, L 332/68.

[93] Agreement between the European Community and Republic of Moldova on the facilitation of the issuance of visas, O.J. 2007, L 334/169.

[94] Agreement between the European Community and Albania on the facilitation of the issuance of visas, O.J. 2007, L 334/85.

[95] Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas, O.J. 2007, L 334/97.

[96] Agreement between the European Community and Former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas, O.J. 2007, L 334/125.

[97] Agreement between the European Community and the Republic of Montenegro on the facilitation of the issuance of visas, O.J. 2007, L 334/109.

address the question of who needs a visa, but rather the procedure detailing how this visa is issued, the two main questions that visa facilitation agreements address are: procedural (how the procedure is simplified) and personal (who can benefit from the simplified procedure). An additional political question arises as to the long-term objective of the agreement; to what extent it is meant to lead to future visa liberalization? However, this political aspect does not have legal implications. Therefore, the analysis of the visa facilitation agreements is carried out along these three lines: purpose, procedure and persons.

2.3.1. The purpose of the agreement

The main purpose of the visa facilitation agreements is to facilitate, on the basis of reciprocity, the issuance of short-stay visas (90 days per period of 180 days). As was mentioned earlier, long-stay visas do not fall under Community competence on visas and are thus excluded from the scope of the agreements.

The long-term objective of all agreements is declared as visa liberalization, although the level of intensity of this commitment varies. In the case of the Western Balkan countries, the agreements state that it is "the first concrete step towards the visa free travel regime"[99]. The wording used in the other three agreements is somewhat different. In the case of Russia, where the reciprocity element was strongest due to the visa requirements that Russia imposes on EU nationals and the difficulty in obtaining them, in the visa facilitation agreement the parties only state their "intention to establish visa-free travel". In the case of Ukraine and Moldova the introduction of a visa-free regime is seen as a long-term objective.

2.3.2. Procedure – how is it facilitated?

In principle, "visa facilitation" means a set of arrangements whereby the issuance of visas to special categories of travellers is facilitated or accelerated through

[98] Agreement between the European Community and Republic of Serbia on the facilitation of the issuance of visas, O.J. 2007, L 334/137.

[99] Third recital of the agreements with the Western Balkan states (Albania, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Montenegro, Serbia).

derogations from the normal procedures set in the Common Consular Instructions. In the case of the visa facilitation agreements, these derogations take the following forms:

- decreasing the number and type of supporting documents required for issuing of visas;
- issuing of multiple-entry visas;
- decreasing or waiving of visa fees; and
- fixing deadlines for the processing of visa applications.

Each of these derogations can be applied to specific categories of travellers, listed in detail in the agreements.

2.3.3. Persons – who can benefit?

The description of the various categories of travellers who can benefit from the facilitated visa procedures forms the main section of the visa facilitation agreements.[100] It is accompanied by the documentary evidence regarding the purpose of the journey that these travellers have to present. For the categories of traveller listed in each agreement, the documentary evidence mentioned in the text is sufficient for justifying the purpose of the journey. This provision already sufficiently limits the discretion of the consular officials of the Member States when they consider the purpose of the visit. However, proving the purpose is only one (though the core one) element when it comes to granting a visa. Besides the purpose of the visit, each applicant still has to prove, for example, that s/he has sufficient financial means, a return ticket and health insurance. Thus, the facilitation is limited to only one of the documents required in the visa application process.

Facilitated procedure. As far as the categories of persons entitled to facilitation are concerned, the agreements vary to a certain degree. The most comprehensive approach can be found in the agreements with the Western Balkans, and the group of persons benefiting from facilitation is most limited in the agreement with Russia. All agreements include the following categories of citizens:

[100] See for example, Art. 4 from the Visa Facilitation Agreement with Serbia, O.J. 2007, L 334/137.

a) members of official delegations participating in meetings, consultations, negotiations,
exchange programmes and events (in possession of an official invitation);
b) business people and representatives of business organizations (with a written request from a host legal person or company);
c) drivers of international cargo and passenger transportation services (with written request from the national association of carriers);
d) members of train, refrigerator and locomotive crews in international trains (with approval of competent company);
e) journalists (with certificate);
f) scientists and persons active in cultural and artistic activities, including university and other exchange programmes (with written request from host organization);
g) pupils, students, post-graduate students and accompanying teachers (with written request or a certificate of enrolment from the host university);
h) participants in international sports events and persons accompanying them (with written request from the host organization);
i) participants in official exchange with twin towns (with approval of host mayor);
j) close relatives (spouse, children, parents, grandparents, grandchildren) visiting their family legally residing in the EU (with written request);
k) relatives visiting for military or civil burial grounds (with official document confirming the event of death).

One further category is included in the agreement with Ukraine:

l) persons visiting for medical reasons (with official document from host medical institution).

The agreement with Moldova adds two more categories:

m) civil society organizations when undertaking trips for the purposes of educational training, seminars, conferences (with request from host institution);
n) professionals who participate in international exhibitions, conferences, symposia, seminars or similar events (with written request from host organization).

The Western Balkan countries have in their agreements all of the above categories of travellers plus:

o) tourists (with certificate or voucher from a travel agency or a tour operator);
p) religious communities (with approval from registered religious community);

One additional group is included only in the agreement of Albania:

q) persons politically persecuted during the communist regime (with a certificate issued by the Institute for the Integration of the Persecuted Persons).

Multiple-entry visas. A second list of categories of traveller is included in the part of the agreements dealing with the multiple-entry visas.[101] The list varies according to the different agreements but again the agreements with the Western Balkan States are the most complete. There all categories of traveller mentioned above can also be eligible for multiple-entry visas, with the sole exception of tourists. However, there are two categories of multiple-entry visas.

For members of official delegations, national or regional governments and parliaments, and close family members visiting their relatives in the EU (and in some agreements also business people and journalists), multiple-entry visas with a term of validity of up to five years can be issued. There is no need to prove any additional fact beyond that of belonging to one of the three groups defined above.

All other categories of traveller are eligible for multiple-entry visa with a validity of up to one year but on the condition of being *bona fide* travellers. To prove this, the travellers have to show that during the previous year they obtained at least one visa, made use of it in accordance with the laws on entry and stay of the visited state and that there are reasons for requesting a multiple-entry visa.

Decreased or waived visa fees. The fees for processing applications of all citizens of the parties to the agreement are fixed at €35 (the normal visa fee for single-entry visa is at the moment fixed at €70). However, again there is a list (a third one, see Annex 8.3 to Chapter 8) of those categories for whom the visa fees are waived. The categories are similar but not worded in the exactly the same way as the previously mentioned two lists.

The groups of travellers eligible for visa waiver differ from one signatory to another. Overall, again the Western Balkan countries have the widest possible scope, while Russia has the most limited one. One should also note that the list of persons benefiting from "procedural facilitation" does not fully correspond to the list of people eligible for a waiver of the visa fee. The groups that are entitled to facilitation but will still have to pay visa fee are:

[101] See for example Article 5 of the Agreement with Serbia, O.J. 2007, L 334/137.

- Business people and representatives of business organisations
- Persons travelling for tourism
- Attending the funeral of a close relative
- Persons visiting for burial ceremonies
- Visiting military and civil burial grounds
- Visiting for medical reasons and necessary accompanying persons (although this is partially covered by the humanitarian grounds)
- Visiting a seriously ill close relative.

Fixed deadlines for procession of applications. The agreements foresee that the decision on the visa application shall be taken within ten calendar days. There is a possibility to further extend this period, but no longer than 30 calendar days, when further scrutiny of the applicant is needed.

3. Visa facilitation in action

The procedures to obtain a Schengen visa, including the length of the application procedure and the long list of documents required, were often conceived as troublesome and lacking transparency. According to an EU visa policy monitoring survey of eight EU Member States in four Eastern European countries conducted by the Stefan Batory Foundation,[102] the length of procedures differed considerably among the EU Member States, ranging on average from two days in the case of Poland, over eight days in Germany up to 14 days in the case of the Czech Republic. The EC visa facilitation agreement explicitly aims at making these bureaucratic problems less cumbersome and more transparent, as well as pushing the Member States towards a common practice at least in the countries of the agreements.[103]

The major disadvantage of the EC visa facilitation agreements is that they have the potential to divide society between those who are entitled to easier travel and the rest. They could be split into two groups:

[102] BORATYNSKI, CHAJEWSKI, HERMELINSKI, SZYMBORSKA AND TOKARZ, "Visa Policies of European Union Member States – Monitoring Report", *The Stefan Batory Foundation*, November, (2006).
[103] TRAUNER AND KRUSE, op. cit.

> The privileged few who can get a multiple-entry visa, benefit from the simplified procedure […], or profit from the waiving of the application fee for the visa, and as to the remainder: the vast majority of ordinary citizens who cannot enjoy such advantages. This can create a feeling of discrimination and lead to the conclusion that the European Union is interested only in the […] elite.[104]

Most of the visa facilitation agreements entered into force on 1 January 2008 and it is perhaps too early to evaluate the effects of the agreements. A study was conducted by the European Citizen Action Service[105] based on special hotlines for complaints and surveys at the exit of the consulates in five Western Balkan countries (Albania, Macedonia, Serbia, Bosnia-Herzegovina and Montenegro) and monitoring the consulates of six Member States (France, Germany, Italy, Austria, Slovenia and Greece.) The main findings are:

- The agreements do not change the relationship between the consular administration and the citizen. Many who contacted the hotline or participated in the survey complained about being treated in an undignified manner. However, the politeness of officials, training and language skills, opening hours or avoiding queues just to get an application form are not covered. These are the issues of most concern to citizens;
- Similarly the agreements provide for a reduction to €35 and that visas should be processed within 10 days. However these advantages may be offset by the greater additional costs and delays before the processing stage is reached - i.e. the costs of travel, waiting on the phone at a call centre and the days, even weeks; delay involved in arranging an appointment;
- The overall advantages of visa facilitation have not materialized because of a lack of information and also the very diverse ways in which it is implemented, or not implemented, by Member States' consulates.

All in all, it appears that the impact of the visa facilitation agreements that are in force is somewhat limited.

4. Interim Conclusions

Visa facilitation evolved from a response to the concern of new Member States to a general policy, now being adopted towards many other countries. Most of the existing agreements are with European neighbours, but new agreements are being negotiated (or soon to be negotiated) with a number of other countries, ranging from Georgia to Cape Verde, and countries as far-flung as China have actually requested an

[104] BORATYNSKI, GROMADZKI, SUSHKO AND SZYMBORSKA, "Questionable achievement: EC-Ukraine Visa Facilitation Agreement", *The Stefan Batory Foundation*, November, (2006). One could argue, however, that this is justified because the elite constitutes less of an immigration or security risk.

[105] See documents of the Visa Facilitation Final Conference, organized by ECAS – European Citizen Action Service, 10 December 2008, available at: http://www.ecas-citizens.eu/content/view/152/.

agreement. The impact of the existing agreements in Europe seems to have been limited and will anyway only be temporary, at least for the Western Balkans, which is firmly set on the road to visa-free travel. However, the agreements might be more useful in the case of countries that are not in this situation and the request by China to obtain one indicates that this type of agreement meets a certain demand on the part of the EU's partners.

CONCLUSIONS

This chapter dealt with the three legal instruments that were used to address the problems arising from EU enlargement; they range from the very specific to the more general, whose use is no longer linked to the specific concerns of the new member countries.

The first, special travel documents for transit to and from Kaliningrad, concerns essentially only one member country (Lithuania) and constitutes an interesting case of the tensions arising between a state transferring or about to transfer sovereignty and the entity that absorbs it. The EU felt the need to regulate transit from Kaliningrad to Russia even before enlargement, despite the fact that it was already subject to a certain bilateral arrangement between Lithuania (a candidate country) and Russia.

In 2003, i.e. before Lithuania became a member, the EU had already adopted two Regulations on 'facilitated transit', which are clearly applicable only to Kaliningrad. These legal acts transformed the conditions for transit into part of the *acquis* which Lithuania had to adopt upon accession (and to implement upon full integration in the Schengen area). This action by the EU pre-empted any independent bilateral action by Lithuania on an important issue related to its territory, and this despite the fact that the country still had its full sovereign control over this policy field, as these events took place four years before the full integration of the country into the Schengen area. This pre-emptive loss of sovereignty was mitigated only by the fact that Protocol 5 of the Accession Treaty provides an additional guarantee for the protection of Lithuanian interests in stipulating that the measures affecting Kaliningrad can only be changed by unanimity (in derogation of the general rules for adoption of such measures which is QMV).

The second legal instrument used to address concerns of the new Member States' local border traffic agreements are also specific in that they can de facto be applied only to the Eastern (European) land border of the Union. Local border traffic agreements had been widely used in Europe prior to 2004, both between Member States and between acceding states and other third countries. As they were always

concluded between states with visa-free travel among themselves, their focus was always on simplifying the process of physically crossing the border by providing special facilities.

The legal basis for common rules on the local border traffic agreements were provided for early on, (see Article 3, paragraph 1 of the Schengen Convention) namely in 1990 (when the Schengen Convention was signed). However, there were no initiatives on this subject until 2003 (presentation of first Commission proposal).

It should be noted that the nature of the local border traffic agreements contemplated by the EU is quite different from the pre-existing agreement, since the problem became one of facilitating local border traffic between countries which had visa requirements. Without a local border agreement, a resident in a Ukrainian border region might have to travel several hundred kilometres to Kiev to obtain a visa to visit the neighbouring Polish region just 30 km away.

Thus the Commission proposal had to meet new requirements. Local border traffic was no longer about simplifying border crossings but about how to allow for travel without a visa, hence it became an issue of visa policy. The regulations on local border traffic agreements effectively create a quasi-visa document for access to the border regions of the EU.

The communitarization of the field of local border traffic through the Local Border Traffic Regulation constitutes another example of the need for Member States to accept a loss of sovereignty when they have full freedom of movement among themselves, but do not fully trust each other's standards in guarding the external frontier. The insistence of the new Member States on the need to keep their Eastern borders open might have actually increased the impression in 'old Europe' that the new Member States would put more emphasis on this aspect than their security concerns. In practical terms it proved necessary to delegate the exercise of this Community competence to the Member States. But since they did so under the control of the Commission, the role of the latter was clearly reinforced.

The third instrument developed in response to the concerns of the new Member States, namely visa facilitation, follows a somewhat different pattern. Here the lack of trust did not prevail, also because visa facilitation would affect the issuance of visas by all member countries. Moreover, this legal instrument evolved from a response to the concern of new Member States to a general policy, now being adopted towards many other countries.

Visa facilitation is also of a different nature to the other two cases studied in this chapter, as it does not create substitutes for (Schengen) visas but only regulates the practical modalities of issuing Schengen visas. This is a much less delicate issue, from both a legal and political point of view.

Through the three legal instruments discussed in this chapter, the EU tried to appear as a compassionate partner, taking into account the concerns of the new Member States in its legal framework. The impact of these instruments on the ground appears to have been limited, and what will remain is a significant degree of legal fragmentation with one area (Kaliningrad) actually covered by all three instruments. Straight visa liberalization would have avoided this legal fragmentation and achieved better conditions for the free movement of people, but this proved impossible, probably because Member States were not willing to ease access to this extent.

CHAPTER 9 – IMPACT ON EU LEVEL II – RECIPROCITY

The principle of reciprocity is widely used in international relations and treaties and states that favours, benefits or penalties granted from one state to the citizens or legal entities of another should be returned in kind.[1] This is different within the EU because EC law differs from traditional International Public Law by explicitly discarding reciprocity as a condition for equal treatment of EC citizens from other Member States.[2] This work will deal only with the concept of reciprocity outside the EU, i.e. vis-à-vis third states.

Reciprocity (in this sense) has been used in the field of trade agreements, the mutual recognition and enforcement of judgments, extradition agreements and agreements on the relaxation of travel restrictions and visa requirements. There are networks of bilateral visa exemption agreements which are based on the principle of reciprocity.[3]

In practice, the mechanism means that the unilateral (re)imposition of the visa requirement by one of the parties to such an agreement generally entails the (re)imposition of that same requirement by the other party to the agreement. Such a response is implemented by invoking the suspension or denunciation clauses.[4]

Thus, reciprocity naturally entered the realm of European regulation together with the visa policy rules. While the first proposals for regulations setting up the common visa lists, submitted by the Commission in 1995 and 1999, do not mention the issue of

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[1] For a detailed analysis of reciprocity in international relations, see KEOHANE, "Reciprocity in international relations", *International Organisation*, Vol.40, No.1, (1986).

[2] See *Cowan* case. There is a fundamental difference between reciprocity and mutual recognition: in reciprocity certain rights are recognized to another state only if the same rights are given in return. Under mutual recognition Member States recognize the decisions/regulations of each other and cannot suspend this even if one Member State does not comply with this principle. Instead, the remedy is recourse to the court.

[3] For examples of bilateral agreements on the abolition or simplification of visa requirements, see LEE AND QUIGLEY, *Consular Law and Practice*, 3rd edition, Oxford University Press, (Oxford, 2008), p. 222 .

[4] The functioning of this mechanism in a bilateral setting is also explained in an Explanatory memorandum to the Commission proposal for Council Regulation determining the common visa lists, see COM (2000) 577 final/2, Brussels, 01 October 2000, p. 3.

reciprocity, the first proposal submitted after the entry into force of the Amsterdam Treaty, in this case in 2000, contains an elaborate procedure to take into account the possible application of the principle. That the Eastern enlargement constituted a strong catalyst for the elaboration of clear reciprocity rules will be demonstrated below.

The principle of reciprocity in EU visa policy has important implications. Firstly, it provides for a concrete solidarity mechanism among Member States. This particularly benefits the smaller Member States who can rely on the negotiating power of the entire group when they seek the abolition of visas from third states.
The second implication is linked to the first one. Would they be willing to recognize the European competence in the negotiation of visa-free status, if it did not bring the benefit of increased negotiating power to all of them?

The third implication is linked to the role of the Commission. Its power and standing increases because it is responsible for the negotiation of visa-free agreements on behalf of the EU (as opposed to fixing visa requirements for third country nationals).

This chapter will first trace the genesis of reciprocity in EU visa policy. Against this background, it will analyze two issues in particular:

- to what extent did the Eastern enlargement influence the introduction and development of the reciprocity mechanism in the framework of the common visa policy?
- what were the implications of this process for the scope of exclusive Community competence in this field, as well as for the role of the European Commission?

The chapter is divided into four sections. The first will follow the origins of the principle of reciprocity in European regulations; it will assess its mechanisms and the evaluation of its application. The second will follow the development of the principle following the Eastern enlargement; it will study the proposal presented by the Commission and the reactions to it up to its final adoption and implementation. The third section will study the application of the principle through analysis of the reports

presented by the Commission. The final section is dedicated to the challenge to the system posed by the US Visa Waiver Program.

The case of the US is particularly interesting because the principle of reciprocity works of course mainly between countries of a similar level of economic development (and not too dissimilar political power). As discussed in Chapter 1, this explains why the richest OECD countries today have far fewer visa restrictions imposed on them than the visa requirements that they impose.[5] The US is of course one of them. The EU presents a complex issue for the US because its Member States comprise (after enlargement) countries of widely differing levels of development. The US is naturally tempted to treat different member countries differently, but this is not acceptable on the EU side because of the combination of the principles of solidarity and reciprocity.

Throughout this chapter the analysis is carried through the three prisms defined earlier: solidarity between Member States, the protection of their sovereignty (defined through the exclusive or shared character of the competence in question) and the role of the European Commission.

1. The original reciprocity mechanism

The first two visa regulations: that of 1995[6] and of 1999,[7] did not mention the principle of reciprocity. The reasons for this could be several, the major one being that Article 100c EC brought only two aspects of visa policy within the Community framework – the determination of the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (the so-called black list or negative list) and the establishment of a standard model visa. Thus, both regulations contained only the negative visa list and Member States were still

[5] See NEUMAYER, "Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalised World", *Transactions of the British Institute of Geographers*, 31 (1), (2006), pp. 72-84.

[6] Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O.J. 1995, L 234, pp. 1–3 (hereafter Regulation 2317/1995).

[7] Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O.J. 1999, L 72, pp. 2–5 (hereafter Regulation 574/1999).

free to "determine the visa requirements for nationals of third countries not on the common list."[8]

Another reason why reciprocity was not mentioned in the 1990s is that the EU visa system existed then only as a supplement to the Schengen system (or vice versa) which brought together only some of the Member States. Article 6 of both regulations states that the regulations are "without prejudice to any further harmonisation between individual Member States, going beyond the common list, determining the third countries whose nationals must be in possession of a visa when crossing their external borders". At that time the EC 'black' list constituted only a sort of minimum harmonisation in the sense that for any country which was not on the EC black list Member States were free to decide whether to require visa from the citizens of this state. However, the Schengen States proceeded to further harmonisation among themselves regarding the treatment of the countries which were not on the EC black list – resulting in a separate Schengen black list. (See Table 10.1 in Chapter 10 for a comparison between the EC and Schengen black lists.)

In such a legal framework, Member States' rights to use the principle of reciprocity in their bilateral relations with third countries was not limited, as they still held the power to determine their own white visa list, as well as their policy towards every country that was not on the common list.

This situation changed with the entry into force of the Amsterdam Treaty, which brought all other aspects of visa policy into the Community framework, integrating them in the new Title IV EC (visas, asylum, immigration and other policies related to free movement of persons), having as an objective the establishment of an area of freedom, security and justice (see Chapter 5). In addition, the Protocol annexed to the Amsterdam Treaty integrated the Schengen *acquis* into the framework of the Union. This was also extended to a range of harmonization measures regarding visas which the Schengen states have introduced.

[8] Article 2 (1) of Regulation 2317/1995 and also of Regulation 574/1999.

The Commission moved in January 2000[9] with a proposal for a new regulation aiming at the full harmonization of the list of non-member countries. The proposed regulation satisfied Article 62(2) (b) EC and its Annexes contained two lists of countries. Thus a country could be listed either in Annex I (and thus be subject to visa requirements) or Annex II (and be exempted). Having the two lists fully harmonized would preclude the Member States from unilaterally determining the visa rules for any third country at all.

The consequences of this full harmonization for the application of the principle of reciprocity were not considered in the initial Commission proposal, and reciprocity was not mentioned in the proposal of 26 January 2000. Reciprocity is not mentioned in the main body of the regulation, but a small reference is made in recital 2, which sets out the criteria used for placing countries on one or the other visa list. The recital reads:

> The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and **reciprocity**.[10]

Beyond this brief mention, no elaboration as to the meaning or even possible application of 'reciprocity' was presented. The European Parliament also expressed no concerns about the absence of the reciprocity in the proposed Regulation.[11] The Council, however, insisted on this issue and to reflect the Member States' desire to give "an operational dimension to reciprocity", the Commission added a paragraph 4 to Article 1 in its amended proposal of 21 September 200l.[12]

[9] Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, (COM (2000) 27 final, Brussels, 26 January 2000), O.J. 2000, C 177E, pp. 66–69.

[10] Recital 2 of original Commission proposal, COM (2000) 27 final, Brussels, 26 January 2000, op. cit. p. 11.

[11] No mention of it is made in the report adopted by the LIBE Committee on 21 June 2000, See: A5-0179/2000 final

[12] Amended proposal for a Council Regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (presented by the Commission pursuant to Article 250(2) of the EC Treaty) Corrigendum (COM (2000) 577 final/2, Brussels, 01 October 2000), O.J. 2000, C 376E, p. 1.

The discussions in the Council highlighted the fact that the Regulation is silent on the question of how to react in situations where response mechanisms were laid down in bilateral visa exemption agreements concluded by Member States with various third countries. The purpose of the introduction of this principle in the regulation is to make it possible to react to any third country that is exempted from the EU visa requirements but which imposes a visa requirement on nationals of a Member State.[13] Prior to the regulation, such protection was given by the reciprocity mechanisms set out in the bilateral visa exemption agreements that the Member States had in force. But how are the interests of EU citizens to be protected, when the visa lists are common and the right to retaliate is no longer held by the Member States themselves?

Under the rules of the Amsterdam Treaty, such retaliation would fall within the context of Article 62(2)(b)(i) EC. Determining the countries whose nationals are exempt from the visa requirement is a matter of exclusive Community competence and therefore, in the words of the Commission:

> pending the conclusion of future agreements between the Community and third countries on exemption from the visa requirement, suspending any such exemption must now be done by means of a Community mechanism.[14]

The amended proposal now included an additional subparagraph to Article 1 of the proposed Regulation and an extension of one of the recitals to take account of the new parts concerning reciprocity. The Commission acknowledged that the proposed subparagraph is based on work done by the Council on this issue.[15]

1.1. The Commission's proposal

The proposal made by the Commission[16] was presented as a temporary measure "pending the conclusion of agreements on exemption from the visa requirement

[13] The EU-15, as group of relatively rich countries did not face the prospect of its citizens being moved on a black by third countries (see also below). This changed with enlargement to EU-27. The case of Canada, which re-imposed in 2009 visa requirements on citizens from the Czech Republic is a case in point.

[14] See page 3 of Explanatory Memorandum of COM (2000) 577 final/2, Brussels, 01 October 2000, op. cit.

[15] See p.3 of Explanatory Memorandum of COM (2000) 577 final/2, Brussels, 01 October 2000, op. cit.

[16] See the amended proposal of the Commission, page 8, COM (2000) 577 final/2, Brussels, 01 October 2000, op. cit.

between the Community and the third countries listed in Annex II". Two procedures, both with similar automatic mechanisms were foreseen. The first, in case a third country exempted from visa requirements imposes a visa requirement on nationals of a Member State includes:

- notification in writing by the Member State concerned to the Commission and the Council (the Member State **may** notify however, it is not obliged to do it),
- no later than two months after this notification, the Commission shall publish a notice on the measure in the Official Journal and
- suspension of the exemption of visa requirements for nationals of that third country – five days after publication of the notice.

The second procedure is to be applied when a third country revokes the measure imposing the visa requirement for nationals of a Member State and it includes similar steps:

- notification in writing by the Member State concerned to the Commission and the Council (in this case, the Member State **shall** notify) ;
- on receiving the notification, the Commission shall publish a notice in the Official Journal and
- five days after the publication of the notice, the exemption from the visa requirements for nationals of the third country shall be restored.

The way the proposal is worded implies that the reciprocity procedures can be used in cases when a third country already on one of the two EU lists changes its position towards the citizens of one of the EU Member States. The case in which there is already divergent treatment of EU citizens is not addressed. One should also note that suspension and restoration of the visa exemption towards the third country takes effect without the need for an amendment of either of the annexes to the Visa Regulation.

Thus, the main characteristics of the Commission proposal can be summarized as follows: in terms of procedure, the start of the mechanism is voluntary but the consequences are automatically imposed; in terms of institutional involvement the mechanism is seen as temporary, pending the conclusion of Community visa exemption agreements; the Commission is a major player in the operation of the

mechanism. The mechanism is voluntary, the 'victim' Member State may set the procedure in motion by notifying the Commission and the Council but it is not obliged to do so. However, once the notification is made, the rest of the procedure follows automatically with a set of fixed deadlines with no possibility for the re-evaluation of the case or any emergency brake. The publication in the Official Journal and the suspension of the visa exemption are actions that the Commission shall take. The Commission also plays an important role in the process, as it is the institution responsible for the publication of the notices in the Official Journal, despite the fact that the Council is also notified.

1.2. How the mechanism was meant to function

Many of these elements were altered in the text finally adopted by the Council, which differs from the Commission's proposal in several important aspects.

First of all, the certainty of the conclusion in the future of agreements on exemption from the visa requirement between the Community and third countries is absent[17] and leaves room for other outcomes. In the final text, the establishment of visa requirements for nationals of Member States by a country on the EU white list **shall** give rise to the application of the reciprocity provisions "without prejudice to the provisions of any agreement which the Community may have concluded with that third country granting exemption from the visa requirement". Thus, the reciprocity mechanism will be operational without a direct temporal link to the conclusion of Community agreements.

The voluntary character of the first phase of the procedure is maintained. The 'victim' Member State may notify the Commission and the Council about the establishment of visa requirements but is not obliged to so.[18] However, once the notification is made, the automatic character of the retaliation is maintained. The retaliation in the form of subjecting the nationals of the third country concerned to visa requirements is

[17] See Article 1 (4) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2001, L 81, pp. 1–7.

[18] Council Regulation (EC) No 539/2001, op.cit., Article 1 (4) (a).

considered as "*Member States' obligation*" and underlines the solidarity element of the mechanism.[19] The European Parliament insisted on an even stronger formulation by using the expression "*an obligation on the part of all the Member States covered by the Regulation*",[20] instead of the formula "*Member States' obligation*" which was ultimately adopted by the Council.

Thirty days after notification, visa requirements for citizens of the third country shall be established provisionally and the provisional introduction of visa requirements shall be published in the Official Journal before it takes effect.[21] However, the responsibility for the publication here is entrusted to the Council instead of the Commission.

Unlike the Commission's proposal, the procedure finally adopted does indeed contain a possibility for the interruption of the process. The power is given to the Council which can decide, acting by qualified majority, within the 30 days following the notification not to establish the provisional visa requirements.[22]

It is not clear from the text how long the provisional application can be. The European Parliament insisted that "the provisional application of the visa requirement shall be limited to six months"[23] but this proposal was not taken on board by the Council. There is no indication on its exact length, but there is a procedure for the transformation of the provisional application into a permanent measure, forming part of the annexes to the Visa Regulation. The Commission is obliged to examine any request made by the Council or a Member State to submit a proposal for amendment to the Visa Regulation. However, there is no indication as to a deadline for the submission of a proposal. But, if prior to the adoption by the Council of such an amendment, the third country repeals its decision to establish a visa requirement, the

[19] Council Regulation (EC) No 539/2001, op.cit., Article 1 (4) (b).

[20] See Amendment 3 to the Draft Council Regulation, European Parliament document, Report on the Draft Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, A5-0056/2001, 8 February 2001, p. 6.

[21] Council Regulation (EC) No 539/2001, op.cit., Article 1 (4) (c).

[22] Council Regulation (EC) No 539/2001, op.cit., Article 1 (4) (b).

[23] See Amendment 3 to the Draft Council Regulation, A5-0056/2001, op.cit., p. 6.

Member State concerned shall immediately notify the Council and the Commission. The notification is published in the Official Journal by the Council and the provisional introduction of visa requirements for nationals of the third country is to be repealed seven days after the date of publication.

The automatic character of the provisional introduction of visa requirements and the lack of deadline for their transformation into permanent measures through amendments to the Annexes of the Visa Regulation, indicates that the provisional application is conceived more as an incentive measure for the third country to reconsider its decision than as a retaliatory and irreversible measure meant to restrict access of third country citizens to the EU.

In this final version of the reciprocity mechanism, it is still designed to be forward-looking and there are no special rules to tackle a situation in which the citizens of a Member State are already subject to visa requirements prior to the entry into force of the Visa Regulation.

To sum up, the reciprocity mechanism in the form adopted by Council Regulation No 539/2001 provides, at the request of the 'victim' Member State, for a joint response consisting of successive stages:

- notification by the Member State whose nationals are concerned by the visa requirement,
- introduction provisionally by the Member States, unless the Council decides otherwise, of a visa requirement for nationals of the third country in question
- announcement in the Official Journal of the provisional introduction of the visa requirement,
- examination by the Commission of any request from the Council or a Member State to transfer the third country from the Regulation's positive list to the negative one.

1.3. The first three years: evaluation

In the three years following the entry into force of Regulation EC No 539/2001, the reciprocity mechanism was never applied. Meanwhile, on the 27 November 2002 the Commission submitted a new proposal for the amendment of Regulation (EC) No 539/2001; one of the objectives of which was to embark on a process of reflection on the reciprocity principle and its implications.[24] The replies to the Commission's questionnaire, sent to the Member States on the 23 July 2002, revealed that certain Member States' nationals were subject to the visa requirement in certain Annex II countries. In addition, certain Annex II countries were exempting certain Member States' nationals from the visa requirements but for a period shorter than the period for which the Member States exempted those countries' nationals. Therefore, the Commission considered that "an in-depth review of the meaning and scope of reciprocity", in conjunction with the mechanism provided for by Article 1(4) is necessary. Thus, Article 2 of the amending Regulation[25] stated: "The Commission shall report to the European Parliament and the Council no later than 30 June 2003 on the implications of reciprocity and, if necessary, shall present appropriate proposals."

However, such a report was never presented. Instead, the Commission prepared a Commission staff working document, almost a year later, when enlargement became imminent.

Another interesting aspect of this amending Regulation with regard to reciprocity is related to the external competence of the Community to conclude visa exemption agreements. To recall, this was an important issue during the negotiations of Regulation (EC) No 539/2001, whereby the Commission considered that the full harmonization of EU visa requirements would mean that the Commission would be responsible for negotiating Community visa exemption agreements to replace the bilateral ones negotiated by the Member States. However, the clarity of the

[24] The other two objectives were: follow-up to the conclusions of the Seville European Council, which gave top priority to reviewing the Visa Regulation and a number of technical adjustments needed to respond to the evolution of the international and European legal context. See COM (2002) 679 final, Brussels, 28 November 2002.

[25] Council Regulation (EC) No 453/2003 of 6 March 2003 amending Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempted from that requirement, O.J. 2003, L 069, pp. 10-11.

Commission intentions was lost in the final text of the Regulation and the issue remained ambiguous.

The amending Regulation of 2003 was the first test of how exactly this would be applied in practice. One of the proposals in the amending regulation was for the moving of Ecuador from Annex II (visa exemption) to Annex I (visa requirements). The Explanatory memorandum reads:

> The decision to transfer Ecuador to Annex I to Regulation No 539/2001 must reflect the bilateral visa exemption agreements between Ecuador and the Member States. The date for implementation of the visa requirement in relation to Ecuadorian nationals must therefore be set in such a way that they can abide by the time-limits set for denunciation of these agreements.[26]

This explanation of the Commission is clearly based on the fact that at this point the (bilateral) visa exemption agreements of Member States were still in force and making changes in the EU visa lists required denunciation of these bilateral agreements.

1.4. The impact of enlargement

The key reason why the reciprocity mechanism was effectively not applied until 2004 must have been the fact that only a few countries found themselves in the situation described by the reciprocity mechanism and that the movement of persons between the countries involved was not that significant.

According to the Commission, the situation in February 2004 was as follows:

[26] Proposal for a Council Regulation amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement (COM (2002) 679 final, Brussels, 28 November 2002, Explanatory Memorandum, p. 2.

Table 9.1. Visa requirements imposed by third countries on EU Member States (February 2004)

Third country on the positive visa list	Member State or associated states whose citizens are subject to visa requirement
Brunei	Austria, Finland, Greece, Portugal, Iceland
Guatemala	Iceland
United States	Greece
Venezuela	Finland

Source: Explanatory Memorandum to the Proposal for a Council regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism, COM (2004) 437 final/2, page 2.

The Commission also tried to examine other possible reasons for this in a Commission staff working paper completed in February 2004.[27] Overall, the Commission concluded that there were two main problems with the existing mechanism: its voluntary nature and its rigidity due to its virtually automatic effect. The Commission observed that whereas the nationals of some Member States or associated states were subject to a visa requirement by certain third countries on the positive visa list, the states concerned had refrained from initiating the reciprocity mechanism. And as has been outlined earlier, the Member States had the possibility but not the obligation to give notice of the situation and put the reciprocity mechanism in motion.

A possible reason for the reluctance of Member States could have been the virtually automatic nature of the mechanism, whereby invoking it could spark a major crisis either in external relations with the third country concerned or internally, according to the Commission. Moreover, once set in motion, the procedure could only be blocked by a qualified majority decision by the Council, a decision that could be regarded as a refusal by the Member States to act in solidarity with the Member State concerned, and was thus unlikely.

According to the Commission, the inadequacy of the reciprocity mechanism could only increase after enlargement:

> After 1 May 2004, the situation described in Article 1 (4) of Regulation (EC) No 539/2001 may be invoked by the new Member States with regard to third countries that continue to subject their nationals to a visa requirement. All the new Member States are legally entitled to invoke the reciprocity mechanism with regard to several

[27] Document JAI-B-1 (2004) 1372, 18 February 2004.

> third countries. The inadequacies and risks associated with the reciprocity mechanism observed since 2001 are thus enhanced by enlargement and make it even more necessary to review the mechanism.[28]

Apart from the possible diplomatic complications of the new Member States deciding to use the reciprocity mechanism, the scope of the application of the reciprocity mechanism changed dramatically with the 2004 enlargement. Instead of the handful of cases illustrated in the table above, for which the mechanism was relevant prior to 1 May 2004, dozens of cases could be expected. On the basis of informal information collected by the Commission, among the 33 third countries that appeared on Annex II of Council Regulation 539/2001 in 2004 and were thus exempted from visa requirements, 22 countries required visas from one or more new Member States. Altogether there were 112 cases of non-reciprocity towards new Member States as of 1 May 2004.[29]

Based on these two considerations, the Commission presented a proposal for the amendment of Regulation (EC) No 539/2001 as regards the reciprocity mechanism on 19 July 2004, two and a half months after the 2004 Eastern enlargement of the EU.

2. New momentum

2.1. The Commission submits a new proposal

In its justification, the Commission stressed that the proposed review was not intended to weaken the solidarity that characterised the common visa policy and the place of reciprocity as a fundamental principle of visa policy is maintained. The proposals were intended as an introduction of an operational mechanism that was "more flexible and more realistic."[30] And the mechanism then in force was judged as failing to recognize the political dimension of reciprocity by being too maximalist and too fraught with political risk, and by emphasizing reprisal and completely ignoring the diplomatic approach.

[28] Explanatory Memorandum to the Proposal for a Council regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism, COM (2004) 437 final/2, Brussels, 19 July 2004, p. 3.

[29] Report from the Commission to the Council on visa waiver reciprocity with certain third countries, COM (2006) 3 final, Brussels, 10 January 2006, p. 4 and Annex 1A.

[30] COM (2004) 437 final/2, Brussels, 19 July 2004, op.cit.

The changes proposed by the Commission were also meant to remedy what was seen as a fundamental defect in the previous system, namely that the initiation of the procedure depended only on the actions of the Member State affected by a third country's introduction of a visa requirement. What the Commission proposed is that the principle to guide the common visa policy was reciprocity, based on solidarity among all the Member States with regard to measures taken against them. To ensure this solidarity and to protect Community interests, the Commission insisted that the new mechanism should give the Commission a real, effective negotiating instrument, which had to be consistent with the Union's overall external relations policy.

Thus, with the overall objective of ensuring a more effective observance of the principle of reciprocity, the Commission proposed several changes to the reciprocity mechanism. Solidarity was the key word there and the Commission considered that solidarity with the Member States experiencing situations of non-reciprocity required that the existing system be adapted so as to make it effective. The changes proposed by the Commission were the following:

> *1. Abolition of the voluntary character of notification by Member States.*
> While previously the Member States could choose whether to notify cases of non-reciprocity, now they are obliged to do so. Whenever a third country listed in Annex II introduces a visa requirement for nationals of a Member State, the Member State concerned shall notify in writing this fact to the Council and the Commission within ten days. The notification, as with the previous system, will be published in the Official Journal.[31]
>
> Having the notification system established as an obligation is meant to give the Commission an overview of the non-reciprocity affecting all Member States.[32] Thus, when the Commission undertakes bilateral contacts in order to remedy the situation, it would be able to speak for all Member States and thus strengthen the solidarity among them once again.
>
> *2. Transitional arrangements, especially relevant for the new Member States.*
> The act that puts into effect the EU reciprocity mechanism, according to the Commission proposal is "*the introduction*" of visa requirements for nationals of a certain Member State. This indicates that a new situation has arisen, thus clarifying the temporal limits of the implementation of the mechanism; a point which was not clearly elaborated in the original reciprocity mechanism. Now, the wording of the text clearly indicates that the principle of the reciprocity mechanism applies in the case of newly arisen situations.

[31] Article 1 of the Commission proposal modifying Article 4 (a) of Regulation EC No 539/2001, COM (2004) 437final/2, Brussels, 19 July 2004, op. cit, p. 7.

[32] Note that in this context Member State is understood to mean all Member States (except Ireland and the UK) as well as Iceland and Norway.

However, in order to cover the situation of the new Member States, transitional arrangements are introduced in Article 2 of the Commission proposal. As a result, Member States whose nationals, at the date of entry into force of the Regulation, are subject to a visa requirement by a third country listed in Annex II of Regulation (EC) No 539/2001 shall notify the Commission (note that the Council is not mentioned in this notification) in writing and within ten days of entry into force of the Regulation (the same deadline as the notification of new situations). The notification is also published in the Official Journal.[33]

3. Abolition of the automatic character of the procedure. The original reciprocity mechanism foresaw that once the notification by a Member State was made, a series of automatic steps followed that over-emphasized the reprisal aspect by making it the 'normal' response, from which the Council can derogate.

In its proposal, the Commission proposed a mechanism that combined measures of variable levels and intensities that could be rapidly carried out. Those measures consist of the following steps:

- Negotiations by the Commission (or other appropriate steps). Once the notification is published, the Commission shall immediately take steps with the authorities of the third countries to restore visa-free travel. This process can take up to six months, and at the latest within six months of the publication of the notification, the Commission should report on those procedures to the Council.

- Imposition of provisional measures on the temporary restoration of the visa requirement for nationals of the third country in question. Such provisional measures can only be proposed by the Commission and are not directly linked to the report on the negotiations. The Commission can propose them at any moment even if it has not previously submitted a report to the Council. The only institution that can decide on those measures is the Council, which acts with qualified majority.[34]

- Amendment of the Visa Regulation and transfer of the third country in question from Annex II to Annex I of the Regulation. Such a proposal can again only be made by the Commission and it is not linked directly to the earlier stages of the process. The only limitation is that when provisional measures have already been decided, the proposal amending the Regulation shall be presented by the Commission at the latest six months after the entry into force of the provisional measures.

- Restoration of visa-free travel with the third state. In the cases when a third country abolishes the visa requirement, the Member State has to notify the Commission only (not the Council) and the notification is then published in the Official Journal. As a result, any provisional visa restoration decided in the earlier stages of the procedure shall automatically terminate on the date of entry into force of the abolition of the visa requirement by the third country concerned.

[33] Article 2 of the Commission proposal, COM (2004) 437final/2, Brussels, 19 July 2004, op. cit., p. 8.

[34] Article 1 of the Commission proposal modifying Article 4 (a) of Regulation EC No 539/2001, COM (2004) 437final/2, Brussels, 19 July 2004, op. cit, p. 8.

What is not clear from the text here is what happens when the procedure has moved beyond the provisional measures and the amendment of the Visa Regulation becomes fact together with the move of the third country concerned from Annex II to Annex I. Undoubtedly, the procedure to change this situation will be longer and more complicated than the reversal of the provisional measures.

2.2. Increased role for the Commission

The role of the Commission in the new mechanism is strengthened. With the abolition of the automatic character of the procedure following notification, every stage now would depend on an action by the Commission. As one of the addressees of the notification, it takes steps to restore visa-free travel, it can make proposals both for provisional measures and for the modification of the Visa Regulation and finally, it is the body to be notified once the visa requirements to a Member State are lifted, and the visa-reciprocity can be restored.

The Commission, in its Explanatory Memorandum to the proposal, insists that its role is consistent with the fact that the Community has exclusive powers to take external action with regard to visa requirement/visa-free travel. Moreover, it also states that the proposed wording reflects the desire that the mechanism should follow the customary decision-making pattern in the visa field.

The European Parliament took a great interest in the proposal, even though the procedure in this case was, at the time, consultation and not co-decision. Overall it agreed with the philosophy and the main elements of the proposal. Its main concerns were related to the second phase of the mechanism, so it proposed that the concept of reciprocity be understood in a wider sense; to include conditions and procedures which constitute an obstacle to free travel.[35]

As far as the proposed mechanism is concerned, it is acknowledged that the main objective of the EU's action needs to be visa-free travel for all citizens to those countries that benefit from visa-free access to the EU.

[35] Report on the proposal for a Council Regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism, A6-0065/2005 FINAL, 21 March 2005.

A weakness in the system is considered to be the fact that at the end of the six months period in which the Commission is undertaking efforts to re-establish visa-free travel, the Commission has to report to the Council, and may propose measures but is under no obligation to do so. So a situation may arise whereby after the six month period, the Commission simply reports to the Council but does not propose any concrete retaliatory measures, thus leaving the Member State concerned still subject to visa requirements.

This is particularly important in the context of enlargement. The purpose of the procedure is to reinforce the solidarity of the Member States; it is important to stress that in the area where there is exclusive Community competence, the individual Member States are reprieved of the power to act unilaterally. This is particularly valid for the new Member States, which can find themselves in a situation whereby they are bound to respect Regulation No 539/2001 and accept nationals of third countries without a visa, while their citizens need a visa to visit the same third countries. The report of the LIBE Committee therefore states in its Explanatory Memorandum:

> This particular situation following enlargement requires that the criteria of reciprocity as one of the criteria to determine those third countries whose nationals are subject to the visa requirement by the EU should be strengthened in comparison to the other criteria.[36]

The European Parliament also supported a reinforced role for the European Commission. Such a reinforcement can be achieved if the Commission has not only the power but also the obligation to propose a concrete action at the end of the period of informal contacts or negotiations, in the form of the establishment of visa obligations for nationals of the third country concerned or any other measure. In fact, measures outside the visa field but in the realm of external relations are also mentioned, such as the re-examination of co-operation agreements; the temporary suspension of political dialogue; the exclusion of the country from the EU's system of generalized preferences; and the freezing of financial assistance or trade sanctions.[37]

[36] op., cit (EC) No 539/2001, p. 14.

[37] Report on the proposal for a Council Regulation amending Regulation (EC) No 539/2001, op. cit., p. 14. See also the Opinion of the Committee on Foreign Affairs of 15 March 2005 for the Committee on Civil Liberties, Justice and Home Affairs, on the proposal for a Council Regulation amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism.

Another element highlighted by the European Parliament is the definition of the concept of reciprocity in too narrow a manner. The Commission proposals address reciprocity only as a question of whether a third country introduces or keeps a visa requirement. However, there might be cases where reciprocity can be also sought in relation to the conditions and procedures for issuing visas (an issue which was later addressed in the negotiations on the visa facilitations agreements, notably with Russia). To that effect, the European Parliament proposed the inclusion of a new procedure in the proposal, meant to specifically treat the cases of reciprocity in procedures.[38]

As to the timeframe of the reciprocity procedure proposed by the Commission, the European Parliament agreed with it in principle but suggested that the initial notification should be given within 90 days rather than within the 10 days proposed by the Commission, following the introduction of the visa requirements in order to give the Member State concerned the possibility to negotiate on a bilateral basis with the third country concerned.

The European Parliament also invited the Commission "to focus more attention on visa questions in general that developed after the recent treaty revisions and in particular after EU enlargement", as the whole area is of great concern to citizens and to third country nationals wishing to travel to the EU.

Moreover, the rapporteur, Mr. HENRIK LAX, underlined that the EU should also clarify and itself abolish its own disproportionate requirements for granting visas to third country nationals.

2.3. The final text

The final text broadly followed the procedure proposed by the Commission. The three main changes were linked to the involvement of the Council and the Member States in the procedure, the deadlines for action and the reporting requirements.

[38] Opinion of the Committee on Foreign Affairs, op. cit., Amendment 9, p. 10.

1. Involvement of Council and the Member States. While in the Commission proposal the Commission was the main actor in the operation of the reciprocity mechanism: receiving the notifications, acting on them and reporting, in the final proposal the role of the Council and the Member States appears to be strengthened. The Council also becomes an addressee of all notifications, both for the imposition of visa requirements on EU Member States and for the lifting of such. The Council has the possibility, through deliberation, to influence the imposition of temporary measures.[39] A role for the Member State concerned, in each individual case going beyond the notification, is also outlined. When the Commission takes steps with the authorities of the third country to restore visa-free travel, it has to do so in consultation with the Member State concerned. The latter may also state whether it wishes the Commission to refrain from the temporary restoration of visa requirements (without a prior report).[40]

2. Deadlines for action. The deadlines for action originally proposed by the Commission were for the most part prolonged, with one exception. The deadlines for Member States' notification were prolonged, as well as the deadline for the possible amendment of Annex II of the Visa Regulation, thus giving the Commission more time to negotiate the restoration of visa-free travel. However, the deadline for the first report from the Commission on the steps taken to restore visa-free travel was cut from 6 months to 90 days.

Table 9.2. Deadlines for the actions foreseen in the framework of the reciprocity mechanism: comparative table between the Commission proposal and final text

Action	Commission Proposal	Final text
Notification for introduction of visa requirements	10 days (from introduction or its announcement)	90 days (from introduction of its announcement
Report from the Commission on steps taken to restore visa-free travel	Within 6 months (of publication of the notification)	Within 90 days (from the publication of the notification)
Temporary restoration of visa requirements - proposal by the Commission	No deadline	No deadline
Temporary restoration of visa	Within 3 months	Within 3 months

[39] The exact wording of the amended paragraph 4 (c) of Article 1 is "The Commission may also present this proposal [for temporary restoration of visa requirements] after deliberations in Council on its report".

[40] Amended para 4(d) of Art. 1.

requirements – Council action		
Amendment of Annex II of the Visa Regulation – proposal by the Commission	At the latest 6 months (after entry into force of the provisional/temporary measure)	At the latest 9 months (after the entry into force of the temporary measure)
Termination of the temporary measures	The date of entry into force of the abolition of visa requirement by the third country concerned.	7 days after the publication in the Official Journal
Notification in cases of existing non-reciprocity (new Member States)	Within 10 days (of entry into force of the Regulation)	Fixed date - 24 July 2005 (= 1 month after the entry into force of the Regulation)

Source: own compilation based on the text of the Commission proposal and the final text of the Council Regulation.

3. The reporting requirements. The original Commission proposal imposed on the Commission the obligation to produce a report in the framework of the reciprocity procedure, namely the report on the steps taken to restore visa-free travel, following the initial notification by a Member State. However there was no direct link between the contents of the report and the proposal for future action made by the Commission, as such proposals were to be made even without a prior report. In any event, such a report was country specific and was linked to a concrete notification by a Member State.

The final proposal contains the obligation for an overall report addressing reciprocity for all Member States. A new paragraph 5 is added to the amended Article 1 of Regulation No 539/2001 which reads:

> As long as visa exemption reciprocity continues not to exist with any third country listed in Annex II in relation to any of the Member States, the Commission shall report to the European Parliament and the Council before the 1 July of every even-numbered year on the situation of no-reciprocity and shall, if necessary, submit appropriate proposal.

Interestingly enough, although this text provides for more information for the European Parliament, it was not proposed by the Parliament itself.

With all the above-mentioned alterations, the new procedure which entered into force on 24 June 2005 was designed to work as follows.

- Notification. Where a third country listed in Annex II introduces visa requirements for nationals of a Member State, the Member State concerned is obliged to notify the Council and the Commission in writing. Such a notification is published in the C

series of the Official Journal. The notification also has specific contents, which include the date of implementation of the measure and the type of travel documents and visas concerned (e.g. ordinary passport, service passport, diplomatic passport and short-stay or long-stay visas). The deadline is fixed at 90 days from the introduction, or its announcement, thereby giving the Member State concerned some time to conduct bilateral negotiations. If the third country decides to lift the visa obligation before the expiry of the deadline, the notification is considered superfluous.[41]

There are also transitional measures, mainly aimed at the new Member States, but also of relevance to the old ones. Article 2 of Council regulation (EC) No 851/2005 holds that all Member States whose nationals are subject to visa requirements by countries on Annex II of the Visa Regulation, shall notify the Council and the Commission in writing at the latest one month after the entry into force of the Regulation; the objective being to establish a comprehensive list of the existing visa non-reciprocity. It was not possible to establish such a list earlier as there was no obligation to give notice of the non-reciprocity.

- Negotiations by the Commission. Immediately after the publication of the notification, the Commission is to take steps with the authorities of the third country concerned. However, it is does not do this alone but in consultation with the Member State concerned. Within 90 days of publication of the notification, the Commission, in consultation with the Member State shall report to the Council. Such a report may or may not be accompanied by a proposal providing for the temporary restoration of the visa requirement for nationals of the third country concerned.[42]

- Imposition of temporary measures. The Commission may make a proposal to the Council for the temporary restoration of the visa requirement for the nationals of the third country concerned. Such a proposal can be made following a report or even without a prior report. In both cases, the Member State concerned is involved, either as 'co-author' of the Commission report, or in the case of proposal without a prior report, it may state if it wishes the Commission to refrain from such an action.

[41] Paragraph 4 (a) and (c) of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.
[42] Paragraph 4 (b) of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.

If a proposal is made, the Council acts on it by qualified majority and within a strict deadline of three months.[43]

- Imposition of permanent measures – amendment of the Visa Regulation. The first two stages of the procedure do not affect the Commission's right to present a proposal amending the Visa Regulation in order to transfer the third country concerned to Annex I, and thus make the restoration of visa requirement permanent. When there are already temporary measures in place, there is a strict deadline for the submission of the proposal for permanent measures, and at the latest it is nine months after the entry into force of the temporary measures. Such a proposal shall also include provisions for the lifting of the temporary measures previously introduced. While this procedure is ongoing, the Commission is expected to continue its efforts in order to induce the authorities of the third country in question to reinstate visa-free travel for the nationals of the Member State concerned.[44]

- Restoration of visa-free travel with the third state. Where the third country in question abolishes the visa requirement, the Member State concerned shall immediately notify the Council and the Commission. The notification is published again in series C of the Official Journal and any temporary measures imposed on the third state terminate seven days after publication of the notification. The only case where the temporary measures continue to have effect is when two or more Member States are subject to visa requirements. Then the temporary measures terminate only after the last publication.[45]

- Regular reporting. As regards the entry into force of the regulation and until full visa reciprocity is achieved with the countries on the EU positive visa list, the Commission is to report to the European Parliament and to the Council every two years on the situation of non-reciprocity and to submit proposals if necessary.[46]

[43] Paragraph 4 (c) and (d) of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.
[44] Paragraph 4 (e) of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.
[45] Paragraph 4(f) of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.
[46] New paragarph 5 of the amended Article 1 of Regulation (EC) No 539/2001, op. cit.

3. Reciprocity in practice

3.1. The practice of reciprocity

On 4 June 2005, Council Regulation (EC) No 851/2005 of 2 June 2005 was published in the Official Journal.[47] The Member States had to notify the cases of non-reciprocity by 24 July 2005. Due to the flexible arrangements in the visa field, the United Kingdom and Ireland were not bound by Council Regulation (EC) No 539/2001 and so were not part of the reciprocity mechanism. However, Iceland and Norway participated in the mechanism, and they are bound by the Regulation (EC) No 539/2001 due to their association with the Schengen *acquis*.[48] According to the Commission, the follow-up of the notifications by Iceland and Norway is ensured in the same procedure as the non-reciprocity cases notified by Member States; there are certain legal constraints on the external representation of Norway and Iceland by the Commission, however.

Notifications of non-reciprocity situations existing at the time of entry into force of the new Regulation (24 June 2005) were made by 18 Member States[49] and Iceland and Norway. The first notifications were published in the Official Journal of the 11th October 2005,[50] which started the 90 day period within which the Commission was to take steps with the authorities of the third countries concerned to convince them to abolish the visa obligation they still imposed on nationals of certain Member States and to report to the Council.

[47] See Council Regulation (EC) No 851/2005 of 2 June 2005, amending Regulation (EC) No 539/2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, O.J. 2005, L 141, p. 3.

[48] Iceland and Norway informed the Council in accordance with Art (2a) of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* that they accept the content of Council Regulation (EC) No 851/2005, op. cit.

[49] Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia and Sweden.

[50] All notifications were published as follows: O.J. 2005, C 163 (Czech Republic), O.J. 2005, C 251 (Slovakia, Estonia, Latvia, Lithuania, Greece, Germany, Czech Republic, Poland, Slovenia, Portugal, Cyprus, Malta, Hungary, Italy and Finland, in the order of the publication), O.J. 2005, C 277 (Austria, Denmark and Sweden) and O.J. 2005, C 310 (Iceland and Norway).

Meanwhile, the Council and the Commission also made a statement referring to the possibility of taking other provisional measures towards the third countries concerned, particularly in the political, economic and commercial fields. In this, they followed the recommendation made by the European Parliament during the consultation on the revision of the reciprocity mechanism.[51] Moreover, the danger of retaliatory measures in fields other than that of visas could also work as an incentive for the reconsideration of the visa non-reciprocity by the third countries concerned. The statement stresses that the reciprocity mechanism and the provisional introduction of visa requirements foreseen by it for the third countries concerned:

> in no way prevents the application of other provisional measures to such a third country in one or more other fields (particularly political, economic or commercial fields) in accordance with the relevant legal basis or bases in the Treaties if such measures would be deemed an advisable part of the strategy to be implemented to induce the third country to restore visa-free travel for nationals from the Member State or States concerned.[52]

Having the notifications in place and the formal 'stick' of the common statement, the Commission could proceed with its responsibilities under the reciprocity mechanism. Following the notification, the additional information received from the Member States and the consultations held with them, the Commission delivered verbal notes to the third countries concerned and held a series of bilateral meetings with their authorities.

The results of these Commission activities are described in the first Report of the Commission to the Council on visa waiver reciprocity with certain third countries.[53] Overall, the Commission distinguishes three categories of third countries according to the level of achievement:

- third countries with which a positive outcome has already been achieved;[54]

[51] See Report on the proposal for a Council Regulation amending Regulation (EC) No 539/2001, as regards the reciprocity mechanism (final A6-0065/2005), op. cit.

[52] O.J. 2005, C 172, p. 1.

[53] Report from the Commission to the Council on visa waiver reciprocity with certain third countries in accordance with Article 2 of Council Regulation (EC) No 851/2005 of 2 June 2005 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, COM (2006) 3 final, Brussels, 10 January 2006.

[54] Costa Rica, Nicaragua, Panama, Venezuela, Brazil.

- third countries with which a solution of the non-reciprocity problems has already been announced, but needs further implementation and/or verification,[55] and
- third countries with which a solution is significantly far-removed in time.[56]

In view of the progress achieved, the Commission concluded that there was no need at that stage to include in the report a proposal for the temporary restoration of the visa requirement, or for measures such as those contained in the Council and Commission joint statement. In its conclusions of 21st February 2006, the Council endorsed the Commission's analysis and urged the Commission to strengthen its efforts with the United States, Canada and Australia, and to monitor progress with the other third countries concerned.

The assessment of the Commission about the efficiency of the new mechanism is very positive and it is not hard to see why. Even before the first round of notifications and negotiations carried out by the Commission, the number of countries with visa non-reciprocity started to decrease.

Table 9.3. Number of third countries on Annex II of Council Regulation 539/2001 for which non-reciprocity exists (February 2004 – October 2006)

Date	Number of third countries on Annex II for which non-reciprocity exists	Total number of third countries on Annex II
February 2004 Commission proposals	4	33
1 May 2004 Accession EU 10	22	33
24 June 2005 Entry into force of the reciprocity mechanism	13	33
3 October 2006 Second report on reciprocity	8	33

Source: own compilation based on the reciprocity reports from the Commission.

The second report on reciprocity was delivered by the Commission on the 3 October 2006.[57] In it the Commission concluded:

[55] Brunei Darussalam, Malaysia, Singapore, Uruguay.

[56] Australia, United States of America and Canada.

[57] Report from the Commission to the European Parliament and the Council on cases where visa waiver non-reciprocity is maintained by certain third countries in accordance with Article 1(5) of

> The Commission considers that the dialogue with third countries under the new reciprocity mechanism has already proven effective. The steady and significant fall in the number of "non-reciprocity situations" (cases where a third country maintains a visa requirement for nationals of a Member State) is a remarkable success in the Commission's opinion.
>
> However, progress remains stalled with one third country (United States) while the situation is evolving with regard to Australia, Canada and Brunei. The future developments with these countries will determine the reflection on the appropriate approach that would allow for further and concrete progress towards the realisation of reciprocity.

In its conclusions of 5-6 October 2006, the Council endorsed the Community's need to continue to work towards achieving full visa reciprocity with those third countries for which it had not yet been achieved.

The third report on reciprocity followed the accession of Bulgaria and Romania and was delivered on 13 September 2007.[58] The situation of these two countries could be used as a test case of the efficiency of the reciprocity mechanism.

Table 9.4. Number of third countries on Annex II of Council Regulation 539/2001 for which non-reciprocity exists towards Bulgaria and Romania (February – September 2007)

Date	Number of countries on Annex II for which non-reciprocity exists	
	Bulgaria	Romania
February 2007	13	10
September 2007	9	9

Source: own compilation based on the Third Reciprocity Report of the Commission.

In this report, the Commission concluded that dialogue with third countries under the new reciprocity mechanism had proven effective. Full reciprocity was achieved with New Zealand and Mexico. Significant progress was achieved in dialogue with Australia. Furthermore, a comprehensive visa-waiver agreement was soon to be negotiated with Brazil. However, with regard to Canada and the United States of

Council Regulation (EC) No 539/2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as amended by Regulation (EC) No 851/2005 as regards the reciprocity mechanism, COM (2006) 568 final, Brussels, 3 October 2006.

[58] Third Report from the Commission to the European Parliament and the Council on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity in accordance with Article 1(5) of Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as amended by Regulation (EC) No 851/2005 as regards the reciprocity mechanism, COM (2007) 533 final, Brussels, 13 September 2007.

America, it was concluded that little progress had been made. If this continued to be the case, appropriate retaliatory measures would have to be considered. This showed the willingness of old Member States to stand by the new ones.

In its conclusions of 18 September 2007, the Council took note of the Commission's report and indicated that the competent Council bodies would continue the discussion.

3.2. Legal issues brought by the application of the reciprocity mechanism

The success of the reciprocity principle in its first three years of application (2005-2008) is beyond doubt. The numbers are clear: following the compulsory notification of the cases of non-reciprocity their numbers significantly decreased. The mere fact of accession to the EU affected visa requirements towards the new Member States. And visa requirements towards their citizens were lifted by some countries even before the Commission took any steps. Between the date of the accession of EU 10, the 1st May 2004, and the date on which the notification of visa non-reciprocity became compulsory, the number of countries requesting visa from EU citizens decreased from 22 to 13. After one year of application of the reciprocity mechanism, this number further decreased to 8 third countries. The effect of the EU membership and the potential retaliatory measures was also demonstrated in the case of the accession of the EU 2 – Bulgaria and Romania. Nine months after their accession, the number of countries requiring visas from their citizens decreased from 12 to 9, in the case of Bulgaria and from 10 to 9 in the case of Romania, thus bringing them into line with the situation of the other Member States.

The operation of the principle also showed the willingness of the Member States to let the Commission handle the negotiations. The Commission reports show the mechanism worked in practice. The Commission exchanges information and holds coordination meetings with the representatives of the Member States but then negotiates alone with the third countries concerned. This method of operation and the threat of possible retaliatory measures that go beyond the visa policy managed to induce most of the third countries maintaining visa non-reciprocity to change their rules. There were two exceptions however, both with legal implications. The first had

to do with the need to base the visa exemption on an international agreement in some cases, due to the fact that the third country concerned could not change the rules unilaterally (the case of Brazil and to a certain extent Singapore). The second case had to do with three countries: Australia, Canada and the USA, for which a combination of several factors impeded progress for almost the whole of the period of operation of the reciprocity mechanism. They had strict visa requirements and no particular incentives based on economy or international relations were going to hold sway, since they had a relatively equal standing with the EU itself. These two cases will be studied further.

3.2.1. Community visa exemption agreements

The need for the first ever Community visa exemption agreement arose in relation to Brazil. Let us recall that Brazil was the country for which, when acceding to Schengen, Portugal insisted on maintaining its bilateral visa exemption agreement (see Chapter 4). Up until 1998, Brazil was still on the so-called 'grey' list of countries for which some Member States required visas but others did not. In any event, since the first positive common list was drawn up in 2001, Brazil was consistently on it. However, the exemption from visas for EU citizens visiting Brazil was based on bilateral agreements.

When the first report on reciprocity was drafted by the Commission in 2006, Brazil was notified by seven Member States,[59] of which only Austria was an old Member State. Following contacts with the Commission, the Brazilian authorities expressed and formally confirmed a political willingness to exempt from visa requirements the citizens of the Member States concerned. However, there was a legal problem.

According to the Brazilian constitution, since a visa exemption entails a loss of fiscal revenue, it requires the approval of the Brazilian Parliament. Therefore, from the

[59] Austria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania and Malta. See the Report from the Commission to the Council on visa waiver reciprocity with certain third countries in accordance with Article 2 of Council Regulation (EC) No 851/2005 of 2 June 2005 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, COM (2006) 3 final, Brussels, 10 January 2006, p. 6.

Brazilian side there was a need to negotiate an international agreement. Thus, Brazil informed the Commission of the difficulties, from a political point of view, of replacing or amending the existing bilateral agreements with other Member States. These agreements have the advantage of allowing a stay of up to six months,[60] compared to only three months under the rules of Regulation 539/2001. Moreover, according to Article 20 (2) of the Schengen Convention,[61] the agreements are not affected by the Schengen Rules, and can therefore continue to apply.[62]

Instead, in July 2005 Brazil sent to the Commission a draft agreement with the European Community concerning nationals of those Member States still required to hold a visa to enter Brazil, stating that it would exempt them from this requirement, leaving the existing bilateral agreements with other Member States unaffected. The legal difficulties with this proposal are clearly stated in the Commission report:

> Given the exclusive external competence of the Community in this area, the conclusion of a visa waiver agreement between the EC and Brazil, which would be applicable only to a limited number of Member States, is not possible. When the Community exercises its external competence, it exercises this competence for the whole Community, subject to the opt-out provisions concerning Ireland and the United Kingdom.[63]

Taking this into account, the Commission instead decided to present a recommendation to the Council aiming at obtaining negotiating directives for a visa waiver agreement between the European Community and Brazil covering all Member States, which would replace the existing bilateral visa-waiver agreements with Member States. This would be the first time a bilateral visa-waiver agreement had been negotiated between the Community and a third country.

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[60] As in the case of the bilateral agreement between Brazil and Portugal prior to the later accession to Schengen.

[61] Article 20 of the Schengen Convention holds:

"1. Aliens not subject to a visa requirement may move freely within the territory of the contracting parties for a maximum period of three months during the six months following the date of first entry, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

2. Paragraph 1 shall not affect each contracting party's right to extend beyond three months an alien's stay in its territory in exceptional circumstances or in accordance with a bilateral agreement concluded before the entry into force of this convention."

[62] PEERS, *EU Justice and Home Affairs Law*, 2nd edition, Oxford EC Law, (Oxford, 2006), p.177-178.

[63] See COM (2006) 3 final, Brussels, 10 January 2006, p. 7.

It took one a half years to solve "a number of problems relating to complications arising from the Community's legal order" and on 9 July 2007, the Commission adopted a Recommendation to the Council to open negotiations with Brazil on a visa-waiver agreement between the European Community and Brazil.[64]

Meanwhile, bilateral agreements for visa exemption already concluded by the Member States continued to enter into force. The Czech Republic informed the Council and the Commission that the agreement concluded with Brazil on 29 April 2004 on abolishing the visa requirement had come into force on 3 October 2005. On 7 November 2007 Romania informed the Commission that, following the entry into force of the Agreement between the Government of Romania and the Government of the Federal Republic of Brazil concerning the abolition of the visa system, as of 11 November 2007, Romanian citizens would be exempt from the visa obligation for transit and journeys of short duration.

On 18 April 2008, the Council adopted a decision authorizing the Commission to open negotiations on the conclusion of a short-stay visa-waiver agreement between the European Community and Brazil. The negotiations were opened on 2 July 2008.

What the negotiations guidelines of the Commission are is not clear, as neither the Commission Recommendation nor the Council Decision have been made public. It is therefore not possible to say at this stage what the scope of the agreement will be and how the existing complex competence issues will be addressed. Following several rounds of negotiations, by January 2010, the parties succeeded to agree to a draft text of the short-stay visa waiver agreement for holders of ordinary passports.[65]

It seems that this problem is only specific to Brazil, since in the meantime the Community has signed agreements with several small countries from the Caribbean

[64] Unfortunately, the document is not considered public and is thus not available on the Council website, or on Eur-lex. The Commission reference is SEC (2007) 927 final, and the Council reference is 11599/07.

[65] Fifth Report from the Commission to the Council and the European Parliament on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity in accordance with Article 1(5) of Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as amended by Regulation (EC) No 851/2005 as regards the reciprocity mechanism, COM (2009) 560 final, Brussels, 19 October 2009, pages 10-11.

on short-stay visa-waivers. Six agreements were signed with Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis and the Seychelles on 29 May 2009. In this case the negotiations were relatively quick as they started on 18 July 2008 and were concluded on 16 October of the same year. The difference might be that the conclusion of such agreements was one of the conditions for removing those states from the visa black list. Article 2 of Regulation (EC) No 1932/2006 states that for these six countries, the exemption from the visa requirement is to be applied only from the date of entry into force of an agreement on visa exemption, which is to be concluded by the European Community with the countries in question.

The new visa regime provides for visa-free travel for EU citizens when travelling to the territory to these six states and for citizens of those countries when travelling to the EU, for a period of stay not exceeding three months during a six month period.[66]

The legal basis used is Article 62, point 2(b)(i) of the EC Treaty, in conjunction with the first sentence of the first subparagraph of Article 300 (2). Interestingly, the agreement contains a special article on the relation between the Agreement and existing bilateral visa-waiver agreements between the Member States and the other states. Thus Article 7 of the Agreement with Antigua and Barbuda holds:

> This Agreement shall take precedence over the provisions of any bilateral agreements or arrangements concluded between individual Member States and Antigua and Barbuda, in so far as their provisions cover issues falling within the scope of this Agreement.[67]

3.2.2. Defining the visa requirements – being on the other side

As from the first Commission report on reciprocity, there were three countries with which progress was slow and with which the extension of visa-waivers to all EU Member States was not in sight – Australia, Canada and the United States. The

[66] Council doc. 10442/09 (Presse 156), EU signs visa-waiver agreements with Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis and the Seychelles, Brussels, 28 May 2009; for the beginning of the negotiations see: EU/JHA: Commission hopes to open negotiations on visa waiver agreements with six countries (Bulletin Quotidien Europe 9603 – 16 February 2008).

[67] Council doc. 7514/09, Council Decision on the signing and provisional application of the Agreement between the European Community and Antigua and Barbuda on the short-stay visa-waiver, 30 March 2009.

process of negotiations with these countries showed the limits of the objective criteria for visa-free travel and the difficulty negotiating when such criteria are not well defined. Usually, such shortcomings are mentioned by third countries subject to visa requirements by the EU, when they qualify the EU visa system. In the case of Australia, Canada and the USA, the European Commission could experience first hand the problems third countries face when trying to get on the EU white list.

The conditions required to qualify for visa-free travel of each of the three countries are quite different, especially in the way in which they are fixed or not in national legislation. However, in all cases the conditions are mainly meant to address concerns about illegal immigration, organized crime, document security and in some cases terrorism.

Australia. Australia was the country with which the progress made was most noticeable. As a rule, to travel to Australia, all non-citizens must obtain a visa. Depending on the nationality of the person concerned, the visa application must be made electronically – either an Electronic Travel Authority (ETA) or an eVisa, or at a diplomatic mission.
The ETA is a system of automatic notification of travellers, whereby the traveller's details, such as name and passport details are sent electronically to the relevant Australian authorities to check against the list of undesirable foreigners. The response is almost immediate. The eVisa requires an application to be submitted via internet for processing in Australia. Depending on the risk assessment level, the authorities can require further supporting documents from the applicant. If the risk is low, the eVisas are granted automatically.

Compared with the European Union, Australian visa policy is not focused on a short stay of three months, but offers a more generous approach for stays of up to twelve months including generous and facilitated entry and stay conditions.[68]

[68] Such conditions include on-line visa applications for visas valid for up to twelve months as of July 2005, working holiday arrangements, on the basis of which travel funds can be supplemented through incidental employment, visa facilitation for students and simplification through issuance of permits covering both residence and work.

Among the criteria used as to whether to require from citizens of a country ETA or eVisa are: the level of overstay rate, the possibility to distinguish online between travel documents issued to citizens and to resident non-citizens, the use of fraudulent supporting documents, visa cancellation rates and visa refusal rates.[69]

The Commission efforts concentrated precisely on those conditions and the reasons put forward by the Australian authorities to justify maintaining their electronic visa system. Detailed reports explaining how some of the reference rates, such as overstay rate, visa refusal rate, visa cancellation rate are calculated.[70] This step made the process more transparent, as it allowed the Commission to use the data provided in order to make its own evaluation. What is more, the Australian Minister for Immigration and Multiculturalism Affairs informed the Commission[71] that the Australian Government had developed "a strategy for implementation of a number of measures over the next few years to achieve uniformity of visa requirements for all EU Member States."[72]

Canada. The progress with Canada was initially slow. Canada evaluates each country's visa exemption individually and clear criteria as to the preconditions for a visa waiver are not legally defined.

The Canadian visa review is an administrative process founded on an objective assessment of the risks and benefits associated with the movement of a specific country's citizens. The Canadian authorities take into consideration the complex push and pull factors that trigger migration movements, from broad socio-economic conditions to specific regional issues.[73] The assessment of risk and benefits includes many factors, such as (but not limited to):

- immigration issues (i.e. non *bona fide* refugee claimants and clandestine or undocumented migrants),

[69] COM (2006) 3 final, Brussels, 10 January 2006, op. cit. p. 10.

[70] COM (2006) 568 final, Brussels, 3 January 2006, op. cit. p. 11.

[71] In a letter dated 28 August 2006.

[72] For the specific steps, see COM (2006) 568 final, Brussels, 3 October 2006, op. cit., p. 12.

[73] For general visa requirements see http://www.cic.gc.ca/english/index.asp. For detailed rules in relation to reciprocity with the EU see the reports on reciprocity from the Commission to the Council.

- public safety and security issues (i.e. organized crime and counter terrorism, the trafficking and smuggling of persons and goods, serious criminal activity, health risks and concerns),
- the stability of government and public institutions (level of public confidence in institutions, legal system, police and security agencies, immigration and asylum systems, protection of human rights),
- the health and stability of the economy, such as unemployment rates and regional disparities,
- the social and human rights environment,
- the trends and patterns related to incidents of application fraud, passport fraud and visa refusal rates.

Factors are reviewed to ensure that they are consistent with the Canadian immigration programme and the broader mandate: the objectives and priorities of the government of Canada. Decisions to change the visa status of a given country are well-informed and are made after a comprehensive review of key considerations and upon extensive internal consultation.

In the context of the reciprocity dialogue between the government of Canada and the European Commission, more concrete criteria in relation to the EU Member States under review were defined, including looking at:

- consistently low rates of refusal of requests for Canadian visas over an extended period from nationals of the country under review;
- cooperation and information-sharing by the country under review on migration and law enforcement issues such as removals and police investigations;
- low levels of organized crime in Canada linked to the source country;
- low levels of passport abuse or evidence of corruption in the issuance of the country's documents; and
- no influx of non-bona fide asylum seekers from the source country or travelling on the source country's documents.

The Commission made the comment that although dialogue with Canada had been initiated, it was important that it become result-oriented. The main demand on the side

of the Commission was for a "transparent process establishing clear benchmarks that led to a visa waiver for the citizens of all Member States."[74] In the established dialogue, the Canadian authorities expressed their willingness to clarify further the relevant criteria and conditions to be met. Moreover, the Canadian authorities made a statement in a letter to the Commission:

> Canada is committed to making its visa review process more transparent and to providing the European Commission and the new Member States with more information on the thresholds related to visa exemption and imposition.[75]

By November 2006, the Canadian authorities provided explanations of the main thresholds used with regard to the possibility of lifting the visa requirement: visa refusal rates, immigration violation rates, passport security, the passport issuing system, information on lost and stolen passports, security and refugee claims.

By the third Commission report on reciprocity, the Commission concluded that Canada had made its visa review process more transparent and provided more information on the thresholds and their implementation.

Thus, in the case of both Australia and Canada, the negotiations in the framework of the EU reciprocity mechanism led to more transparency on the criteria for visa-free travel and even to the development of special national measures and programmes to guide the developments towards visa-free travel for the EU Member States. The situation with the third state in this group – USA, however, was much more problematic.

USA. Visa-free travel to the USA for short stays is based on the US Visa Waiver Program (VWP). The US Visa Waiver Program[76] allows nationals from the participating countries to enter the US as temporary visitors for business or leisure

[74] COM (2006) 568 final, Brussels, 3 October 2006, op. cit., p. 8.

[75] Letter sent by the Canadian authorities to the Commission on 28 June 2006, cited in COM (2006) 568 final, Brussels, 3 October 2006, op. cit. p. 9.

[76] The Visa Waiver Program (VWP) was established as a temporary programme by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Congress periodically enacted legislation to extend the programmes' authorisation. Finally, the programme gained permanent status on 30 October 2000, by the adoption of the Visa Waiver Permanent Act (P.L. 106-396).

without first obtaining a visa from a US consulate abroad. The countries participating in the programme are designated by the Secretary of Homeland Security in consultation with the Secretary of State. The conditions for participation are established by US law[77] and are described briefly below.

To qualify for VWP, a country must:[78]

- offer reciprocal privileges to United States citizens;
- have had non-immigrant refusal rates of less than 3% for the previous year;
- certify that the country issues machine-readable passports;
- have a programme to incorporate biometric identifiers into the passports;
- certify that it reports the theft of blank passports on a timely basis to the US authorities.
- All these criteria are set in the US immigration law and changes in them require legislative amendment.

In addition, the Department of Homeland Security, in consultation with the Secretary of State, has to prepare an evaluation report on the effect that a country's designation as a VWP participant would have on the law enforcement and security interests of the United States, including interests related to the enforcement of immigration laws and the existence and effectiveness of extradition agreements and procedures. In order for the country to be designated as a VWP participant, a determination must be made that such interests would not be compromised by the designation of the country.

Furthermore there are specific factors that are considered but are not established in the legislation:

- the security of a country's passport application,
- the production and issuing process,

[77] The conditions are set by the Immigration and Nationality Act (U.S.C. 1187), the Border Security Act and the Enhanced Border Security and Visa Entry Reform Act.

[78] For details on the programme see http://travel.state.gov/visa/temp/without/without_1990.html. See also the reports on visa reciprocity from the Commission to the Council, COM (2006) 3 final, Brussels, 10 January 2006, COM (2006) 568 final, Brussels, 3 October 2006, COM (2007) 533 final, Brussels, 13 September 2007, COM (2008) 486 final/2, Brussels, 9 September 2008.

- the security of passports and other documents used to demonstrate identity and citizenship, and incidence of fraud or misuse involving such documents
- the nationality and citizenship laws and their implementation,
- the existence of security and law enforcement threats in the country (terrorist activities, organized crime, money laundering, human and drug trafficking, etc.), and efforts to address such threats,
- the immigration controls and alien smuggling activities in the country, and efforts to address such threats
- the stability of the government politically and economically
- the degree of cooperation with the US and other international partners on law enforcement issues, including extradition.

However, ultimately, the designation as a VWP country is at the discretion of the government of the United States. Meeting the objective requirements of the VWP does not guarantee a successful candidacy for VWP membership.

In practice, the way the system works can be illustrated by the treatment of the different Member States that are still not part of VWP. The rule is that countries wishing to participate in the Visa Waiver Program must individually satisfy all these criteria. In February 2005, President Bush proposed a 'roadmap' framework to focus and guide the efforts for a future participation in the Visa Waiver Program. The roadmaps are shaped to the circumstances of each country but contain a number of common elements, including:

- a US agreement to look at the visa application review process;
- removing all pre-1989 cases from overstays calculations;
- the need for the government concerned to meet the well-established technical requirements of US legislation (e.g. overstay and non-immigrant visa refusal rates, biometrics, lost and stolen passport reporting, etc.)
- the need for governments to promote public awareness campaigns to increase awareness of the requirements and obligations associated with travel to the US.

However, such roadmaps are not comprehensive (i.e. they do not cover all the criteria which are applied to a judgment on a country's VWP eligibility) and in some cases the criteria are subjective.

The reciprocity dialogue led the Commission to conclude in one of its reports that:

> although the criteria established by Congress are acceptable, the manner in which they are applied is not: visa refusal rates are, by definition, a matter for the United States consular authorities; yet the Member States concerned receive no information on the reasons for refusing visas; on the subject of overstay rates, the United States does not currently possess a system for recording entries and exits from its territory and therefore has no reliable factual data.[79]

Of all the countries with which the European Commission negotiated in the framework of the reciprocity mechanism, the negotiations with the USA were the most difficult and the least productive. The US kept its visa requirements in place for twelve Member States.

After two reports on reciprocity, the Commission stated in the report of 2007:

> Although no tangible progress has been achieved with the USA on visa reciprocity, the Commission is encouraged that the USA had committed itself to reforming its VWP and has effectively done so.[80]

And indeed, on 3 April 2007 President BUSH signed into law the "H.R. 1 Implementing Recommendations of the 9/11 Commission Act of 2007". Section 711 of this Act covers:

- the Electronic Travel Authorisation (ETA) system for which a fee may be charged;
- flexibility on the non-immigrant visa refusal rate by waiving the 3% rate up to 10% under certain conditions or using a maximum overstay rate, still to be determined;
- setting up a biometric air exit system, that can verify the departure of no less than 97% of foreign nationals that exit through US airports;

[79] COM (2006) 568 final, Brussels, 3 October 2006, op. cit., p.13.

[80] COM (2007) 533 final, Brussels, 13 September 2007, op.cit., p. 11.

- the eligibility of travelling to the USA under the VWP is not a determination that the person is admissible to the USA;
- reporting lost and stolen passports either through Interpol or other means;
- third countries should accept the repatriation of any citizen, former citizen or national against whom a final executable order of removal is issued, and
- bilateral agreements on passenger information exchange.

The proposed law was considered an important step by the Commission and the Member States, as some of the amended criteria (e.g. non-immigrant visa refusal rate) could allow some of the Member States subject to visa requirements to join the VWP. However, this positive development was to be followed by another US initiative which upset the balance that had been achieved between the Community and its Member States in the field of visa policy.

4. A Challenge to the System – the case of the USA

By 2008, the revised reciprocity mechanism had already been operational for three years. In this period, the Commission enjoyed an unchallenged role as 'main negotiator' and interlocutor between the Member States and third states who subjected them to visa requirements. While the Member States still had to conduct some bilateral technical consultations and to ensure the implementation of measures to meet the criteria of the third countries, the role of the Commission and more importantly the exclusive character of the Community competence in the field were not challenged. Such a situation also led to the negotiations of the first Community agreement on visa-waiver reciprocity with Brazil and to the conclusion of several other agreements between the European Community and third states on short-stay visa-waiver. The European Parliament also stressed that:

> the Community's competence in visa matters must ensure equal treatment for all EU citizens, not only in the granting or refusal of visa-free status per se, but also when it comes to the terms and conditions under which such status is granted to, or withheld from, different member States by third countries.[81]

[81] See Motion for a resolution pursuant to Rule 108 (5) of the Rules of Procedure on the debate of the 23rd of April: "Negotiations between the European Union and the United States with regard to visa exemptions (Visa Waiver), B6-0000/2008, 8 May 2008.

Against this background, on 30 January 2008 the US authorities gave the Commission two draft Memoranda of Understanding (MoU) which the US intended to sign respectively with Visa Waiver Program (VWP) candidate countries and those countries already in the VWP.[82] The draft MoU contained several elements of EC responsibility, e.g. the Electronic System for Travel Authorisation (ESTA), enhanced standards for travel documents and the provision of information generated by Schengen rules.

The MoU are a type of non-binding agreement between the Ministry of the Interior of the respective country and the Department of Homeland Security of the USA. The general commitments under the MoU include the waiver of the three percent visa refusal rate requirement, on the side of the USA, in exchange for the implementation of security commitments on the side of the Member State concerned. These security commitments include: measures related to the American Electronic Travel Authorisation (ETA) System, information exchange (including PNR), reporting of lost and stolen passports, repatriation, enhanced standards for travel documents, airport security and air marshals. Clearly some of the above issues fall under Community competence. As to the effects of the MoU, it is clearly stated that it is not intended to be legally binding.

With the enactment of Section 711 on "Secure Travel and Counterterrorism Partnership Act of 2007"[83] on 3 August 2007, the USA reformed their visa waiver regime by adding seven security enhancements[84] so that all the Member States

[82] Fourth Report from the Commission to the Council and the European Parliament on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity in accordance with Article 1(5) of Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as amended by Regulation (EC) No 851/2005 as regards the reciprocity mechanism, COM (2008) 486 final/2, Brussels, 9 September 2008.

[83] The "Implementing Recommendations of the 9/11" is accessible at: http://www.ise.gov/docs/nsis/Implementing911_Act.pdf. The Section 711 should be cited as the "Secure Travel and Counterterrorism Partnership Act of 2007". Signed into law on August 3rd by the US President, http://www.whitehouse.gov/news/releases/2007/08/20070803-1.html.

[84] Four of them are mandatory such as: (1) an Electronic System Travel Authorization System (ESTA) system; (2) more robust security data sharing efforts; (3) requirements for timely reporting of blank as well as issued lost and stolen passports; and (4) guarantees that VWP countries accept the repatriation of their nationals ordered removed from the United States. There are also three discretionary enhanced security factors to be taken into consideration when determining whether the 3% visa denial rate requirement can be waived: (1) airport security standards; (2) air marshals programs; and (3) standards for national travel documents.

wishing to be part of the Visa Waiver Program (VWP) should agree to sign a bilateral Memorandum of Understanding (MoU) and its binding "implementing rules". However, some of the new "security enhancements" fall under:

- Community competence (such as the one on visa delivery or the ESTA);
- EU competence (such as stolen passports,[85] PNR data or Schengen crime-related data);
- the remaining reinforcements fall under the exclusive competence of each Member State (such as those linked to the criminal records of its own nationals or those providing for the presence of air marshals on transatlantic flights).

On 27 February 2008, the Czech Republic became the first Member State to sign such a Memorandum.[86] In the ensuing storm[87] as to whether the Czech Republic could actually do this or not, the Commission took the view that as the general context of the discussion was the agreement on a visa waiver programme, the Commission should negotiate these alone. Member States, meeting at the level of Ambassadors, were of a different view. To avoid further disagreement, the Mixed Committee agreed on a common approach for the purpose of discussion on the issue.[88] In essence, an annex to the document tries to set the delimitation line of the Community and the Member States' competence in the context of the MoU.

[85] See Common Position 2005/69/JHA on exchanging certain data with INTERPOL, O.J. 2005, L 27, p. 61

[86] Memorandum of Understanding between the Ministry of the Interior of the Czech Republic and the Department of Homeland Security of the USA regarding the US Visa Waiver Program and related enhanced security measures, 27 February 2008. For first draft text, see http://www.statewatch.org/news/2008/mar/us-czech-mou-visas-etc.pdf.

[87] For a chronology of events see the reports of Agence Europe : 08/02/2008: EU/JHA: Washington could soon scrap visa requirements for Greek, Czechs and Estonians (Bulletin Quotidien Europe 9598); 11/02/2008: EU/JHA: Washington's new security demands puts EU in quandary (Bulletin Quotidien Europe 9599); 27 February 2008: EU/JHA: Ministers at JHA Council will try to stand united against American security demands (Bulletin Quotidien Europe 9611); 28 February 2008: EU/JHA: EU momentarily renounces battle against Czech Republic over UIS security demands (Bulletin Quotidien Europe 9612); 06 March 2008: EU/JHA: EU establishes common line of defence to face Washington's security demands (Bulletin Quotidien Europe 9617); 07 March 2008: EU/JHA: Commission to present negotiation mandate on American visa waiver programme this Tuesday (Bulletin Quotidien Europe 9618); 11 March 2008: EU/JHA: EU to try to persuade United States to negotiate visa exemptions with it (Bulletin Quotidien Europe 9620); 11 March 2008: EU/JHA: Commission determined that EU law will be upheld in visa discussions with Washington (Bulletin Quotidien Europe 9620); 12 March 2008: EU/JHA: EU and US ready to undo visa regime (Bulletin Quotidien Europe 9621); 13 March 2008: EU/JHA: EU and US to continue discussions on visa system (Bulletin Quotidien Europe 9622).

[88] Council doc. 7338/08, Brussels, 5 March 2008.

On 12 March 2008, the Committee of Permanent Representatives (COREPER) agreed to pursue a twin track approach:

> In order to enable the designation of all EU Member States in the US VWP, there was common agreement that Member States may initiate or develop bilateral commitments with the USA. In this context, it is being understood that EC law will be respected and that the Commission will be kept fully informed. The EC track to be negotiated by the Commission will follow the common approach agreed on 5 March 2008.[89]

The common approach of 5 March 2008 stated clearly that: "Common Visa Policy is a matter of Community competence."[90] Furthermore, the obligation of the Member States to respect the principle of solidarity in accordance with Article 10 (2) EC Treaty was also recalled. The common approach accepted that:

> the aim of the Community, with regard to the US Visa Waiver Program (VWP), is to have all EU Member States participating as quickly as possible in order to ensure full reciprocal visa free travel and equal treatment for all our citizens.

The Ambassadors of the Mixed Committee acknowledged that the new US VWP legislation and its implementation had the potential to impact on several other matters which the US connects with the participation in the VWP but which fall within the competence of EC/EU, and on which the EC/EU may already have adopted internal legislation or concluded agreements with the USA, in respect of which the Member States are therefore constrained as regards their freedom to act. It was agreed that the EU and its Member States take a common approach for the purpose of discussions with the US in relation to the VWP and its implementation. Meanwhile, this common approach also gives guidelines to the Member States which they have to respect in their contacts with the US on these matters. The guidelines are interesting insofar as they delimit the line between the EC and Member State competence in several fields contained in the MoU, but not directly linked to visa policy.[91]

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[89] COM (2008) 486 final/2, Brussels, 9 September 2008, p. 8.

[90] A reference to the non participation of the United Kingdom and Ireland was made. Also, as a reference for the Community competence was included Article 1(4) of Council Regulation (EC) No 539/2001, op.cit., listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement (O.J. 2001, L 81, p. 1) as amended by Council Regulation (EC) No 851/2005 as regards the reciprocity mechanism (O.J. 2005, L 141, p. 3).

[91] The guidelines read:

A statement to follow such a twin-track approach was made during the EU-US Justice and Home Affairs Ministerial Troika meeting on 12-13 March 2008:

> Those matters that fall within national responsibilities will be discussed with national authorities while those that fall within EU responsibility will be discussed with EU authorities. [92]

The European Parliament also welcomed the fact that:

> for the first time the US have recognized the Community's competence to negotiate international visa agreements during the JHA Ministerial Troika on 13 March 2008 by agreeing in a joint statement to follow a "twin-track" approach.[93]

The Parliament's understanding is that under such a statement, the US should from now on negotiate:

- with the Commission visa matters, as they did for air transport (see Open Skies agreement)

"a. Regarding passenger record data, the recently signed EU-US PNR Agreement should suffice and no additional requirements should be added as compared with that Agreement

b. No commitments as to access for the US to EU/EC data bases or information systems.

c. Concerning the exchange of data on lost and stolen passports, Common Position 2005/69/JHA on exchanging certain data with Interpol should be sufficient. Any extension of reporting data to Interpol should be agreed commonly by the EU.

d. Airport security in accordance with ICAO standards is sufficiently guaranteed by existing EC rules (US inspections might be agreed to, if there are direct flights between those airports and the US).

e. Participation in the VWP should eventually create the same rights for all citizens of EU member States as regards the status of their passports.

f. It may be recognized as a principle of international law that a State should take back its own citizens and permanent residents expelled by the US. Any formal agreement on this would only be acceptable on the basis of reciprocity, to be negotiated and concluded between the EC and the US.

g. Information sharing with the US of PNR data obtained from third countries should be consistent with the EU/US PNR agreement;

h. The issue of allowing US Air Marshals onboard US air vessels landing in, or departing from Member States falls under the competence of each Member State.

i. The possibility for the EC/EU to impose obligations on Member States which they will have to comply with (including obligations relating to the possible introduction of electronic system for travel authorisation for US citizens travelling to the EU) should be recognized.", Council doc. 7338, Brussels, 5 March 2008.

[92] See European Parliament, Motion for a resolution pursuant to Rule 108(5) of the Rules of Procedure by Gérard Deprez on behalf of the Committee on Civil Liberties, Justice and Home Affairs on the debate of 23 April: "Negotiations between the European Union and the United States with regard to visa exemptions (Visa Waiver)", B6-0000/2008, 8 May 2008.

[93] See EP resolution, op. cit.

- with the Council on the EU policies on security related matters (PNR agreement or EU-US Agreements on extradition and mutual legal assistance); and
- with the Member States on the presence of air marshals on transatlantic flights and on the security related issues concerning their own nationals.

As regards the EC-US track of this twin approach, on 18 April 2008, the Council adopted a mandate for the Commission to negotiate an agreement between the European Community and the USA regarding certain conditions for access to the US VWP in accordance with Section 711 of the "Implementing Recommendations of the 9/11 Commission Act of 2007,"[94] while at the same time adopting the 'red lines' that the Member States shall respect in their dialogue with the US before the conclusion of the EC/US negotiations. In line with this mandate, the Commission drafted an EC-US agreement, endorsed by the Member States. The purpose of this agreement was to record satisfaction of US legal requirements which fall under EC competence for entry or continued participation in the VWP. This draft agreement served as the basis for the negotiations on the EC track. The European Parliament endorsed the Council mandate given to the Commission to negotiate an agreement with the US. Especially the fact that the mandate stipulated that:

> the agreement should contain a clause whereby, from its entry into force, its provisions shall take precedence over the provisions of any bilateral agreements or arrangements concluded between individual Member States and the USA, insofar, as the provisions of those bilateral agreements and arrangements cover issues dealt with by this agreement.[95]

Of particular importance to the US authorities within the EC track is the issue of information exchange. However, the Commission and the Member States do not

[94] The recommendation from the Commission on this issue was made on 11 March 2008, but it is not considered public document, together with the mandate adopted by the Council. The document number is known but not the text. See Council doc. 7512/08, Recommendation from the Commission to the Council to authorise the Commission to open negotiations for the conclusion of an agreement with the United States of America regarding certain conditions for access to the United States' visa waiver program in accordance with section 711 of the "Implementing Recommendations of the 9/11 Commission Act of 2007. However, a version of the document can be found on Statewatch, see: http://www.statewatch.org/news/2008/apr/us-germany-terr-data-sharing.pdf.

[95] Council doc. 8089, Draft Council Decision authorising the Commission to open negotiations for the conclusion of an agreement between the European Community and the United States of America regarding certain conditions for access to the United States' Visa Waiver Program in accordance with Section 711 of the "Implementing Recommendations of the 9/11 Commission Act of 2007", Brussels, 14 April 2008.

consider it possible to exchange information from EU databases (e.g. Eurodac and SIS) with third countries due to legal constraints. Nevertheless, the Commission is committed to exploring further the possibilities for information sharing with in parallel the US authorities. In the view of the Commission, the parts of the US legal requirement which fall under EC responsibility include repatriation, enhanced travel documents and airport security.[96]

As part of the EC track, the Commission also needs to assess whether the travel authorization under the ESTA is tantamount to a visa requirement or not. On 9 June 2008, the Interim Final Rule for the ESTA was published in the Federal Register. The Commission will provide its preliminary assessment on the basis of this Interim Final Rule as to whether the ESTA is tantamount to the Schengen visa application process as defined in the Common Consular Instructions or not, together with an analysis of the implications of ESTA for the protection of personal data.

As regards bilateral arrangements, seven Member States had signed (by September 2008) a MoU with the USA: the Czech Republic on 27 February 2008, Estonia[97] and Latvia[98] on 12 March 2008, Hungary, Lithuania and Slovakia on 17 March 2008, and Malta on 11 April 2008. Furthermore, Bulgaria signed an interim declaration outlining the security requirements of the VWP with the USA on 17 June 2008. Moreover, in order to improve the cooperation in combating terrorism, including cooperation between intelligence communities in sharing information regarding terrorist threats, the US is clearly seeking bilateral agreements with other Member States as well. For instance, Germany signed an agreement on enhanced cooperation in preventing and combating serious crime on 11 March 2008[99] and Hungary signed on 20 May 2008 an agreement with the USA on the exchange of screening information concerning known or suspected terrorists.

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[96] See letter from Vice-President BARROT sent to Secretary CHERTOFF on 25 June 2008.

[97] See for full text: http://www.siseministeerium.ee/public/MEMORANDUM_ENG.doc.

[98] See full text: http://www.am.gov.lv/data/file/memorands-eng-13-03-2008.doc.

[99] For details see, US Department of Justice, "United States and Germany Agree to Share Fingerprint Databases and Information on Known and Suspected Terrorists", 11 March 2008, available at http://www.statewatch.org/news/2008/apr/us-germany-terr-data-sharing.pdf.

As the negotiations dragged on with no concrete outcome in sight the Commission took the ultimate step and threatened to propose retaliatory measures, in the conclusions to its Fourth report on reciprocity from 9 September 2008, notably a temporary restoration of the visa requirement for US nationals holding diplomatic and service/official passports, as from 1 January 2009, unless additional EU Member States had been brought into the VWP by the end of 2008.

This brought about an almost immediate reaction: on 17 November 2008 six new Member States were brought into the VWP: Czech Republic, Estonia, Hungary, Latvia, Lithuania and Slovakia. These were also the countries which had signed the MoU. It is thus not clear what role the pressure from the Commission had played in this context. It is likely that the thread by the Commission to impose sanctions on the US accelerated the US decision to put these countries into the VWP. Moreover, the common guidelines mentioned above might have helped Member States in their negotiations with the US on the MoUs on issue such as data exchange. However, the fact that the conclusion of an MoU remained a necessary condition for participation in the VWP also shows the limits of reciprocity: a powerful third country which perceives important (and sometimes vital security) interests at stake cannot be forced by the EU to treat citizens from all Member States the same way.

5. Conclusions

Reciprocity became an important issue only when it was combined with the principle of solidarity. But in principle reciprocity was an immediate corollary of the Communitarization of visa policy. De facto the field developed very dynamically only after the 2004 enlargement because until then reciprocity did not prove to be particularly problematic. The Member States which could have triggered the pre-2004 mechanism chose not to do so.

The situation changed radically with the 2004 enlargement, which brought a huge increase in cases of non-reciprocity. Moreover, shortly after 2004 the reciprocity mechanism was changed from being a combination of voluntary notification coupled with automatic retaliatory measures by the EC, to a combination of mandatory notification, which, however, no longer needs to lead automatically to retaliatory

measures by the EC. The reason was that the strict (pre-2004) application of the principle of reciprocity would have led to serious political problems.

Given the nature of the issue there is a need to present a united EU front to the rest of the world if the application of reciprocity as a political tool to extract concessions from a third country is to work. This line of argument was used to create an additional exclusive competence of the Community (to conclude visa-waiver agreements) through the principle of pre-emption.

Up until the US case the Commission had been negotiating relatively straightforward visa-waiver agreements with some other countries (six small island states and later Brazil). However, this did not work in the case of the US.

The exercise of this competence was thus challenged by the US, which for national security reasons was not willing to treat citizens from all Member States equally. The US was willing to apply its rules and standards equally to all Member States, but it judged that some did not meet their (US) standards. What was the reaction of the EU to this hurdle? The new Member States were willing to use the Commission to negotiate de facto on their behalf. The Commission naturally defended their position and the exclusive character of the competence. Given the political difficulties that a strict application of reciprocity would have created (i.e. a clash with the US) Member States agreed on a compromise; the 'twin-track approach' under which the Commission negotiated certain aspects and Member States the remainder. From a strictly legal point of view this approach seems to be correct. However, in practice it seems to have defeated the purpose of the reciprocity mechanism.

The most important lesson[100] to be drawn from the clash with the US, however, is that clearly the rest of the world does not automatically recognize any internal transfer of sovereignty. The external recognition of this internal transfer must be earned through diplomatic means.

[100] A further lesson from the conflict over the exclusive competence of the EU caused by the behaviour of the US was that it challenged the EU to act on another aspect of reciprocity: namely to develop its own criteria for visa-free travel that should be as transparent and objective as those of its biggest partner, the US.

CHAPTER 10 – VISA LIST(S), CRITERIA AND ROAD MAPS

The list of countries whose citizens need visas to enter the national territory of the Schengen area constitutes the central element of visa policy. Agreement on a common list[1] was reached early on in the process of Europeanization of visa policy because it was seen as a necessary 'flanking' measure of the abolition of internal border controls. This transfer of sovereignty was difficult at first, but in the end agreement on the black list proved relatively easy on the basis of the general rule that the common black list was essentially the intersection of the national black lists. Cases of special relationships where individual Member States had a particular interest in maintaining visa-free travel with an important partner were taken care of through a variety of ad hoc measures involving different legal forms.

For acceding states the loss of sovereignty came generally even before (full) membership, partially already during the negotiations, when they had to adopt the EU's black list and partially by the time of their accession, when they had to take over the Schengen *acquis.*

This chapter therefore analyzes the transfer of sovereignty from the other side, i.e. the non-EU states, including those that have become members over the last years (mainly Bulgaria and Romania), those that are on a membership track (Western Balkan countries and Turkey), those covered by the European Neighbourhood Policy (ENP) and the rest of the world.

The chapter starts with a brief analysis of what criteria, if any, are used to establish the list of countries whose citizens need a visa to enter the Schengen space. These criteria then define the steps that partner countries have to undertake to be taken off the black list.

[1] But as discussed in chapter 3 the first Schengen list itself was not published for some time; no information was given on how it had been put together.

The last chapter looked at what happens when the visa list of the EU meets that of its partners. It demonstrated that some partner countries, suc as the USA, have objective criteria for visa-free travel enshrined in their national legislation. Other countries, such as Canada, have criteria similar in substance but not explicitly fixed in a legal form. In fact in both cases, the reciprocity dialogue between these countries and the EU induced them to rethink and clarify their own criteria, and in both cases detailed 'road maps' were developed for each individual EU country wishing to be accorded visa-waiver status.

This raises the question of whether the criteria of the EU are as transparent, detailed and objective as the EU's own partners expect them to be – which will be another theme dealt with in this chapter. While the EU is clearly establishing a political link there is no indication that it is moving towards establishing a (conditional) fundamental right to travel. Instead, the position of the EU remains that visa-free travel constitutes a favour that can be granted or refused ad libitum (or rather solely in function of the EU's own interests).

Section one analyzes the criteria identified by Regulation 539/2001 (Visa Regulation) for the allocation of countries to either the white or black visa lists respectively. Section two provides an overview of the adjustments of the lists so far (transfers from the white to the black list and vice versa). Section three analyzes those cases in which the adjustment was the result of a detailed assessment, namely the cases of Bulgaria, Romania and the Western Balkans. Section four analyzes the impact of the EU's visa list on its new neighbours. Section five looks at the specific case of Turkey in the light of the *Soysal* judgment of the ECJ. Section six concludes with some considerations about the concept of a "visa liberalization" road map.

1. Criteria for the composition of visa lists in the EU

The EU (or rather Schengen) visa lists are now fixed by a Council Regulation "determining the third country whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement",[2] referred to hereafter as the Visa Regulation.[3]

[2] O.J. 2001, L 81/1.

This Visa Regulation exhaustively harmonizes the visa requirements of the Member States[4] by including all third countries and entities on either the black list, (whose nationals are required to have visas when entering Schengen territory), or a white list (whose nationals are exempt from this requirement).[5] The resulting black list is widely considered as extremely restrictive[6] as it contains 131 countries (and the Schengen white list thus contains 36 countries and territories).[7]

However, one has to admit that the US is even more restrictive since it currently has only 35 countries on their visa-waiver programme.[8] Of these more than half are EU Member States, implying that only less than twenty countries outside Europe benefit from visa free travel to the US. Within Europe, the UK appears the more liberal as it requires visas from the citizens of 110 countries.[9] The UK's black list corresponds to the common list agreed under the Maastricht rules[10] and also includes the Commonwealth countries, which previously benefited from visa exemption under the 1995 Visa Regulation.

[3] When the need arises to refer to the regulations adopted earlier, they will be referred to as 1995 Visa Regulation and 1999 Visa Regulation.
[4] The Visa Regulation applies to all EU Member States with the exception of the United Kingdom and Ireland. It also applies to Iceland, Norway, Switzerland and Liechtenstein.
[5] The legal texts always refer to the visa lists (plural) although there is only one list that matters, namely the black list since the countries not on the black list are automatically on the white list as the two lists must be exhaustive. This can be clearly deduced from the text of Article 62 (2)(b) EC.
[6] A. MELONI, *Visa Policy within the European Union Structure*, Springer, (Berlin, 2006) p. 100, E. GUILD, "Moving the Borders of Europe", Inaugural lecture, University of Nijmegen, (2001), p. 33-37; and BEAUDU, "La politique européenne des visas de court séjour", *Cultures & Conflicts*, n. 50, vol. 2, (2003), pp. 5-30.
[7] As of June 2009.
[8] US State Department, Bureau of Consular Affairs, http://travel.state.gov/visa/temp/without/without_1990.html.
[9] Information for the situation in June 2009, UK Border Agency, available at http://www.ukvisas.gov.uk/en/doineedvisa/visadatvnationals.
[10] See Council Regulation No 2317/95 (O.J. 1995, L 234) and Council Regulation No 574/1999 (O.J. 1999, L 72).

Table 10.1. The evolution of the European black list

Period	Ad hoc Group on Immigration		Schengen	1995 Regulation	1999 Regulation	2001 Regulation
Number of countries and territories on the visa black list	1987	1993	126	126 (proposed) 98 (approved)	98	135
	50	73				

Source: Own compilation.

The criteria used to determine whether a country should be on the black or on the white list are outlined in the preamble of the Visa Regulation. These are said to relate to "illegal immigration, public policy and security and to the Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity".[11] The comparison of the evolution of the criteria summarized in Table 10.2 shows a certain persistence of the main themes (migration, public order and foreign policy considerations).

Table 10.2. Evolution of criteria for determining the countries on the visa black list

Period of validity	Criteria for determining the countries on the visa black list
Prior to 1995	1. Threat of an unacceptable level of immigrants from that state. 2. Risk to internal security from nationals of that State. 3. Political – visa restrictions are imposed as a matter of reprisal or in the context of deteriorating bilateral relations. 4. Reciprocity which itself imposes visa restrictions.[12]
Schengen (1995 to 1999)	Not disclosed
Regulations under Maastricht (1995 to 2001)	1. Political and economic situation 2. Relationships with the Community and its Members
Visa Regulation (from 2001 onwards)	1. Illegal immigration 2. Public policy 3. International relations Additional Regional coherence and reciprocity

Source: own compilation.

What has changed with respect to the past is that the criteria are now much more clearly spelled out. The Commission in the Explanatory Memorandum to its original proposal[13] considered each of these criteria in turn:[14]

[11] Recital 5 of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2001, L 81, pp. 1–7.
[12] House of Lords Select Committee on the European Communities (1993-1994) *Visas and Control of External Borders of the Member States*, 14th Report, para 106-108.

To determine whether nationals of a third country are subject to the visa requirement or exempted from it, regard should be had to a set of criteria that can be grouped under three main headings:

- illegal immigration: the visas rules constitute an essential instrument for controlling migratory flows. Here, reference can be made to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration and labour networks), to assess the reliability of travel documents issued by the relevant third country and to consider the impact of readmission agreements with those countries;

- public policy: conclusions reached in the policy cooperation context among others may highlight specific salient features of certain types of crime. Depending on the seriousness, regularity, and territorial extent of the relevant forms of crime, imposing the visa requirement could be a possible response worth considering. Threats to public order may in some cases be so serious as even to jeopardize domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response;

- international relations: the option for or against imposing the visa requirement in respect of a given third country can be a means of underlining the type of relations which the Union is intending to establish or maintain with it. But the Union's relations with a single country in isolation are rarely at stake here. Most commonly it is the relationship with a group of countries, and the option in favour of a given visa regime also has implications in terms of regional coherence. The choice of visa regime can also reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity. The reciprocity criterion applied by States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the Union's external relations with third countries.

Given the extreme diversity of situations in third countries and their relations with the European Union and the Member States, the criteria set out here cannot be applied automatically by means of coefficients fixed in advance. They must be seen as decision-making instruments to be used flexibly and pragmatically, being weighted variably on a case-by- case basis.

The different criteria mentioned above are now examined in more detail:

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[13] Commission of the European Communities, Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 27 final, Brussels, 26 January 2000.
[14] A detailed analysis of the criteria is provided in E. GUILD, "Moving the Borders of Europe", Inaugural lecture, University of Nijmegen, (2001), p. 33-37; and BEAUDU, "La politique européenne des visas de court séjour", *Cultures & Conflicts*, n. 50, vol. 2, (2003), pp. 5-30.

1.1. Illegal immigration

The perceived threat of illegal immigration was reported to be an important factor also at the national level[15] and was also present in the regulations adopted under Maastricht. However, the present Visa Regulation does much to delve further in trying to develop objective and measurable criteria. Moreover, for the first time in the history of visa regulations, the role of visas as an "essential instrument for controlling migratory flows", is explicitly confirmed, thus completing the metamorphosis from a foreign policy tool to a migration policy tool; a metamorphosis that was initiated by the start of intergovernmental cooperation among the Ministries of Interior in the mid-1980s.

The evaluation of whether a country presents a risk of illegal immigration is performed on the basis of three elements: assessment of statistical information; assessment of the reliability of the travel documents issued by that country and assessment of the impact of readmission agreements.

(i) Assessment of statistical information

The Explanatory Memorandum seems to suggest that the assessment of the risk of illegal immigration can be made based on some objective statistical data. It even enumerates several possible sources and types of data to be used. Those include information and statistics on illegal residence, cases of refusal of admission to the territory,[16] expulsion measures, clandestine immigration and labour networks and finally the apprehension of illegal immigrants and the applications for regularization within the context of national regularization programmes.[17]

[15] See House of Lords Select Committee on the European Communities (1993-1994) *Visas and Control of External Borders of the Member States*, 14th Report.
[16] This criterion resembles one of the conditions used by the USA for the lifting of visa requirements, namely that the consulates in the country concerned should have a visa refusal rate below 3%.
[17] The latter two criteria, although not present in the Explanatory Memorandum, were used as grounds for the introduction of visa requirements for citizens of Ecuador in one of the modifications of the Visa Regulation.

The objective set out in the Explanatory Memorandum is clearly the objective assessment of the threat of illegal immigration based on objective indicators such as statistics. But it provides no indication as to what is the acceptable level of this risk. In other words, there is no determination of where the border line lies between acceptable and excessive illegal immigration. Obviously, it is impossible to envision a situation where there is not one single illegal immigrant from a particular country. Thus, once the data based on the above criteria is obtained, it is not clear what the threshold is after which the need for visa requirements arises. Would the number of illegal immigrants be calculated as a percentage of the population of their country of origin, or in absolute terms on the territory of the EU Member States; on the territory of the whole Union or on the territory of an individual state; is it enough to have a significant number of illegal immigrants in one country or in the majority of the countries of the Union? Unfortunately, the only two cases under the Visa Regulation where two countries were added to the visa black list do not provide a clear answer. What seems to be a possible answer is that the evaluation is performed at the national level and each Member State makes its own assessment of whether a country constitutes a risk or not.[18] A country is thus de facto put on the black list if at least some member countries consider that it does not satisfy this criterion.

The second problem is linked to the possibility to collect the type of data identified by the Commission. Some of it seems quite straightforward and a system for its calculation exists, e.g. refusal rates, expulsion measures, and apprehension and regularization data, although the latter can only represent a fraction of the real cases. At the same time, the statistics on illegal residence, clandestine immigration and labour networks are by nature imprecise and the way in which they are collected at the national level varies greatly.

MELONI identifies as a possible positive development in this field several initiatives aimed at the harmonization of the criteria for collection and analysis of this type of information,[19] which could add a European dimension. Despite the potential usefulness of such a development, it is difficult to see how exactly such initiatives

[18] In the case of inclusion of Ecuador on the visa black list, four countries have mentioned it in their response to the questionnaire sent by the Commission.
[19] MELONI, op. cit., p. 101.

could support the objectivity of the decisions taken. The creation of various coordination groups and observatories will play a role in providing a Europe-wide pool of information on migration and can possibly also lower the cost of producing the statistics in the Member States themselves but, ultimately, the assessment of the illegal immigration risk will be always performed at the national level and will correspond more to the specific perception in each country rather than the objective Europe-wide risk.

GUILD puts forward an interesting idea as to the effect of the criteria on illegal immigration on the triangle of actors – EU, state of origin and individual.[20] She considers this particular criterion (illegal migration) to be linked to the behaviour of the individual as such, and not of their state of origin. In this perspective it would appear logical to look at visa policy from the perspective of individual who might acquire a (conditional) right to (visa free) travel. This would change visa policy from an interstate matter to one with the individual as legal subject. However, there is no sign of this happening so far. In this sense there is a fundamental difference between the internal legal order of the EU, which accords rights to individuals (free movement) and the legal order of the EU's external relations, which does not.

It remains true, however, that by establishing a link between the EU's policy and the individual, the Union penetrates the sovereign sphere of the state of origin. The cases of Bulgaria and Romania, which are discussed later in this chapter, provide an illustration of this view; and of the fact that there is very little a democratic state can do to control emigration towards areas of higher economic development.[21]

(ii) Reliability of travel documents

Although the Commission did not elaborate further on this criterion, the practice of its implementation[22] shows that what is meant generally is that a country should have passports with a sufficient level of protection in order to avoid forgery on a massive

[20] GUILD, op. cit., p.34.
[21] What is not acknowledged in this view is the fact that while the state of origin cannot control outwards migratory movements, it can still influence the root causes of the phenomenon and thus decrease the incentives for migration.
[22] Especially in the cases of Bulgaria and Romania.

scale, which in turn can fuel further illegal migration flows. It still remains to be seen whether, following the US example, the Commission will extend the meaning of "reliability" to include certain technical aspects, e.g. machine readability of the passports and certain bio-metric elements. If such a move is taken, this will further enforce the security aspects of a visa and will involve further interference in the domestic legal order of a country wishing to be removed from the visa black list. It is difficult to determine whether improving technical aspects of the reliability of travel documents has strong benefits in terms of the official aim of visa policy. One could argue, however, that fighting crime is made much easier if individuals can be reliably indentified.

(iii) Assessment of the impact of readmission agreements

As has been stated on several occasions, the impact of the few existing Community readmission agreements[23] is difficult to assess and, based on the experience of the Dublin convention, will most probably be negligible.[24] The bilateral readmission agreements, amounting to some 20-30 per Member State, have had a substantial impact, however.[25]

Apart from the concrete numbers, the readmission agreements also carry a substantial symbolic weight. Even if they are not effectively enforced, they signal to societies the possibility of enforcement and thus are meant, purely psychologically, to counter migration fears among the Member States. The readmission agreements represent a kind of insurance policy that in case of problems with illegal immigration, there are always legal means of redress.

Thus, from the list in the Explanatory Memorandum of the Commission, we can conclude that as far as illegal immigration is concerned, in order not to be on the visa black list, a country must meet three conditions: 1) not be the state of origin of a significant number of illegal immigrants towards the Member States, 2) have reliable

[23] I.e. readmission agreements of the EC with third countries.
[24] For the first comprehensive analysis of the readmission agreements see N. COLEMAN, *European Readmission Policy: Third Country Interests and Refugee Rights*, Immigration and Asylum Law and Policy in Europe Series, Martinus Nijhoff Publishers, (Leiden, 2009).
[25] See the following title for the number of readmitted nationals of Bulgaria and Romania.

passports and 3) have signed a readmission agreement with the Community, or the Member States, taking on the obligation to readmit its nationals (and in some cases even third country nationals)[26] who happened to be illegal immigrants in the Member States.

1.2. Public policy

The criteria linked to public policy can generally be categorized in two groups: those linked to crime and those linked to domestic security in general.

On crime, the Commission uses the definitions agreed in the context of police cooperation. The judgment as to whether the imposition of visa requirements could be considered an appropriate measure is then made on the basis of the seriousness, regularity and territorial extent of the relevant forms of crime. The wording used by the Commission is quite general and thus open to various interpretations. Meloni, for example, seems to accept that a Common European Approach in this field is restricted to the objective of combating criminal networks concerned with the smuggling of migrants and trafficking in human beings, and terrorism.[27] The importance of these particular types of crimes can further be supported by the legislative measures deemed important by the Commission when proposing the removal of Bulgaria and Romania from the visa black list.

The second element of the public policy condition relates to threats to public order and simultaneously introduces the concept of solidarity in this field. Thus, in the presence of a threat to domestic security of such magnitude as to jeopardize domestic security in one of the Member States, visa requirements can be imposed. At the same time, the rest of the Member States are supposed to support such an action in the spirit of solidarity, despite the fact that their domestic security is not threatened and that their concept of threat might differ from that applied by the state concerned.

[26] More detailed analysis of the readmission agreements is provided in Chapter 6 of the present work.
[27] She bases this view on the Comprehensive plan to combat illegal immigration, para 82-85.

Thus, as far as public policy criteria is concerned, in order not to be on the visa black list, a country and its nationals should not be considered a source of serious crime or a threat to public order, according to the definitions of police cooperation.

1.3. International relations

The conditions linked to international relations only come third on the list of considerations for the visa status of third countries. This is one more example of the major shift in visa policy that occurred in the mid-1980s. While initially visas were a typical foreign policy tool, and their imposition or lifting were an expression of the foreign policy of the country concerned, now this type of consideration is overshadowed and replaced by the migration tool function of the visa – control of illegal immigration and crime.

As regards international relations, there are three main principles worth considering: the principle of regional coherence, the reciprocity principle and the solidarity principle.

First of all, "foreign policy considerations of the Union and the Member States" are taken into account when adopting rules on short-term visas, and in particular on visa lists. This is explicitly stated in the Declaration on Article 62(2)(b) EC to the Treaty of Amsterdam.[28] However, under the principle of solidarity it is possible that the visa regime reflects the specific position of a Member State in relation to a third country and the other Member States adhere to it. However, reaching an agreement as to whose special relationship should have priority over others' migration fears for example, is a complicated exercise. The experience of the drafting of the visa lists shows that when in doubt and facing a disagreement, the Member States tended to put the disputed country on the visa black list rather than on the white list. Thus, the UK preferred not to participate in this policy field when it was not able to convince the other Member States to put the Commonwealth countries on the white list.

[28] Declaration No 16, which is attached to the Treaty of Amsterdam, and states that "the Conference agrees that foreign policy considerations of the Union and the Member States shall be taken into account in the application of Article 62 (2)(b) of the Treaty establishing the European Community". To recall that, Article 62 (2)(b) EC was the legal basis for EC visa policy.

Unfortunately, this option is not available to the new Member States, so they might need to rely on the solidarity principle enshrined in the Explanatory Memorandum.

The second element introduced by the Explanatory Memorandum in the field of international relations was the principle of regional coherence. There is no detailed explanation linked to that statement, other than that the decisions will not be taken merely on the basis of individual assessment but will consider regional coherence. Obviously, this argument was used in the proposal for the removal of Bulgaria and Romania from the negative visa list, as well as in the case of the Western Balkan countries. However, it will be interesting to study how this "regional coherence" criterion in visa policy plays into the various agreements signed with different groups of countries. This question will be answered further in this study.

The final element linked to international relations is the classic one of visa requirements, namely reciprocity. On the positive side, one could assume that the fact that a country does not impose visa requirements on citizens of the Member States should be a consideration for the removal of a country from the visa black list. This was at least the case for Bulgaria and Romania and was also explicitly mentioned in the case of all Western Balkan countries, even those for which the removal from the negative visa list was postponed. However, this is only a necessary, not a sufficient condition since there are a number of countries on the visa black list which have unilaterally removed visa requirements as a show of good faith (e.g. Ukraine). All these countries hope for a reciprocal gesture from the Union.

Chapter 9 provides a more detailed account of cases of the negative application of the reciprocity principle, namely those in which one or more of the Member States are subject to visa requirements by a third country. Initially, under the Regulation, if a country on the white list imposed visa requirements on nationals of a Member State, all Member States had to introduce visa requirements on nationals of such a third country, as a provisional measure, after the Member State on whose nationals visa requirements were imposed had notified the Council and the Commission.[29] This

[29] Article 1(4) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2001, L 81, pp. 1–7.

reciprocity mechanism was reviewed by the Commission.[30] The review was prompted by the fact that the United States maintained visa requirements on Greek nationals, but Greece never triggered the "solidarity mechanism", which would have caused the whole Community to introduce visa requirements for US nationals. This problem was exacerbated after the accession of the new Member States, some of which were also subject to visa requirements by the United States.

Thus, based on the Commission's Explanatory Memorandum, we can conclude that there are several criteria that a country should meet in order to be placed on the white visa list. The country should not be a source of illegal immigration or crime, should have reliable passports and should sign readmission agreements with the Community or the Member States. In addition, it is preferable that the country does not require visas from citizens of the Member States, belongs to a block of countries with which the Union has an extended relationship and/or has special links to one or more of the Member States.

But how were these elements applied in practice, and what does this practice tell us about the actual meaning of the criteria? This will be discussed below, looking both at cases of removals and additions to the black list.

2. Adjusting the lists

With the adoption of the 2001 Visa Regulation,[31] the first one adopted under the rules of the Amsterdam Treaty, began a process of modifications in the common list of the 1999 Visa Regulation. Major changes in the countries included respectively on the white or black list were introduced in 2001, 2003, 2006 and 2009.

[30] Article 2 of Regulation 453/2003 Council Regulation (EC) No 453/2003 of 6 March 2003 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2003, L 69, pp. 10–11.

[31] The different visa list regulations discussed here are respectively:
'1999 Visa Regulation' which is Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, O.J. 1999, L 72/2; and '2001 Visa Regulation' which is Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2001, L 81/1. Subsequent amendments to the latter regulation are referred to as "the 2003 amendment" and "the 2006 amendment".

Table 10.3. Changes to the visa lists 2001-2009

Year	Legal basis	White to black list	Black to white list
2001	Council Regulation 539/2001	35 countries that were not on the list of Council Regulation 574/1999 but were on the Schengen black list, among which: - 26 Commonwealth countries[32] - 5 micro nation islands in the Pacific[33] and Bosnia and Herzegovina Colombia and the entities East Timor Palestinian Authority	Bulgaria Romania Hong Kong Macao
2003	Council Regulation 453/2003	Ecuador	
2006	Council Regulation 1932/2006	Bolivia British citizens[34] who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law: - British overseas territories citizens who do not have the right to abode in the United Kingdom - British overseas citizens - British subjects who do not have the right to abode in the United Kingdom - British protected persons	Antigua and Barbuda Bahamas Barbados Mauritius Saint Kiits and Nevis Seychelles British citizens who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law: British nationals (overseas)
2009	Council Regulation 1244/2009		Serbia Montenegro FYROM * only for holders of biometric passport

The way in which the criteria analyzed in the previous section are applied in each of the above mentioned cases will be studied in three groups: countries moved from the white to the black list and countries moved from the black to the white list. The special cases of Bulgaria, Romania and the Western Balkans will be studied in section 3. These are of special interest as prior to the removal of those countries from the visa

[32] Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Dominica, Grenada, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Namibia, Nauru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, South Africa, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Vanuatu, Zimbabwe (at the time Zimbabwe was still a member of the Commonwealth).
[33] Marshall Islands, Micronesia, Northern Marianas, Palau, Western Samoa.
[34] The case of the British citizens who are not nationals of the UK for the purposes of Community law will not be studied, as it is more a reflection of the special qualities of the individual rather than country specific issues.

black list, the Commission prepared detailed reports (Bulgaria and Romania) or roadmaps (the countries of the Western Balkans) listing the measures these countries took and evaluating them against the criteria. No such reports were prepared in the other cases of transfer from the black to the white list, or at least their existence is not public and no similar supporting material is mentioned in the Explanatory Memoranda to the Commission proposals.

2.1. From white to black list

The changes of 2001 are the most dramatic as 35 third countries that were not on the black list of the 1999 Visa Regulation, found themselves in a need of visa. The only explanation provided by the Commission is: "following the integration of the Schengen acquis into the Community framework and the criteria mentioned above". Of the 35 countries concerned, the majority (26) are **members of the Commonwealth** and their inclusion in the list reflects the non-participation of the UK in the EC visa policy. The UK was still involved in the adoption of the 1999 Visa Regulation, including the list of countries requiring visas, but did not participate in the adoption of the 2001 Visa Regulation.[35]

Of the remaining countries moved to the black list, only the case of Colombia triggered political tensions due to the special relations of this country with Spain. **Colombia** was the only country on which the Schengen states had not reached an agreement by the time the Schengen *acquis* was incorporated into the European Union legal order.[36] However, there is no way to judge which criteria were used for placing it on the black list, unless there is a Commission report that sheds more light on the issue; and such a report was not produced in the case of Colombia. The 2001 Visa Regulation does not have a requirement to justify the treatment of each country separately[37] and the Council typically does not publish its proceedings. After a heated discussion in the Council, Spain abstained from voting on the 2001 Visa Regulation, a document widely criticized in Latin America. Apparently, the Commission did not provide any official justification on this proposal. There is no justification in the

[35] See Chapter 5 for more details.
[36] The following countries required visas for Colombia at that moment in time: Benelux, France, Greece and Portugal.
[37] GUILD, op. cit., p. 38.

Explanatory Memorandum, or in any other document. The Colombian consulates in the Member States were not provided with any explanation as to the reasons for inclusion of their country on the visa black list. It is suggested that the reason was because of the risk of illegal immigration and crime in the form of drugs.[38]

The 2003 amendment to the 2001 Visa Regulation provided for the inclusion of **Ecuador** in the EU visa black list. The second case of transfer of a country from the white to the black list occurred through an amendment in the Visa Regulation in 2003.[39] The review of the 2001 Visa Regulation was not a result of specific complaints about Ecuador, but of a general review of the black and white lists. The review was mandated by the Seville European Council of 21-22 June 2002, which urged the Council and the Commission to accord high priority to the issue and review the lists by the end of 2002 in the context of the Union's fight against illegal immigration.[40]

The way the Commission proceeded to gather the information necessary for reviewing the visa lists was to send a questionnaire to the Member States (including the United Kingdom and Ireland for information only) asking for a fresh evaluation of third countries in the light of the criteria for the determination of the visa lists. Evaluation of the replies led to the proposal to include Ecuador on the black list. Only four Member States requested the inclusion of Ecuador on the black list on the grounds that recent regularization programmes had shown that a large number of Ecuadorian nationals were illegally present on their territories, and because of political and public order considerations.[41]

The Commission confirmed that each Member State was in a position to evaluate the visa requirements perceived as necessary on a national level, as long as the general criteria outlined in the Visa Regulation were respected.

[38] Migration News Sheet, April 2001, p.3, cited in GUILD, op. cit.
[39] Council Regulation 453/2003, op. cit.
[40] Seville European Council, "Presidency Conclusions", 21-22 June 2002, para 30.
[41] MELONI, op. cit., p. 106.

A date was also prescribed by which the Member States had to bring the visa requirements for nationals of Ecuador into effect.[42] This appeared necessary in the light of past experiences: Spain implemented the visa requirements for nationals of Colombia six months after Regulation 539/2001 had entered into force. In this context, the Commission underlined that a correct and timely implementation of amendments of the black list by all Member States was essential for the common visa policy's success as an instrument to combat illegal immigration.[43]

The 2006 amendment of the 2001 Visa Regulation added one more Latin-American country to the EU visa black list - **Bolivia**. Based on the information received by the Member States,[44] the Commission reached a three-fold assessment. Firstly, in line with the first criteria "illegal immigration" the Commission concluded that "there is persistent and intense migratory pressure from Bolivia". This conclusion was reached on the basis of the large number of refoulements at the external borders and expulsions from several Member States. Secondly, as far as the criteria "public policy" is concerned, the Commission noted that the detention orders and convictions of Bolivians for criminal offences and illegal immigration were also rising. The third factor was the fact that nationals of Latin American countries subject to the visa requirement were seeking to circumvent the requirement by fraudulently acquiring a Bolivian passport.

Based on these findings but without elaborating further on the concrete finding (at least not in the publicly available documents), the Commission declared that it believes that "there are good grounds, in view of the criteria in recital 5 to Regulation 539/2001, for proposing the imposition of visa requirements to Bolivia". Similarly to the 2003 amending regulation, the 2006 amending regulation also fixes the date on which the visa requirement for Bolivian nationals will come into effect

[42] Article 3 (2) of Council Regulation 453/2003, op. cit.
[43] Communication from the Commission to the Council and European Parliament on a common policy on illegal immigration [COM(2001) 672 final, Brussels, 15 November 2001.
[44] The procedure repeated the procedure of the previous review. The Commission has gathered the information by approaching directly the Member States and checking whether the annexes as they stand still correspond to the criteria determined by the 2001 Visa Regulation. Then the Commission cross-checked the information received by the Member States against other information and statistics supplied under the CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration). See p. 2 of the Commission Proposal for the 2006 amendment, COM (2006) 84 final, Brussels, 13 July 2006.

(approximately six months after the entry into force of the regulation). This time, however, the reasons adduced include the need to give some member States time to denounce their bilateral agreements with Bolivia.[45]

2.2. From black to white list

Apart from Bulgaria and Romania, in 2001 there are two more countries (or rather territories) moved from the black to the white visa list – Hong Kong and Macao (while China remained in the visa black list). The objective was to reflect the "one country, two systems" approach, as well as the Commission's assessment of the two entities in relation to the various criteria set.

Thus, the Commission took into account the stable economic and legal situation and the satisfactory provisions relating to immigration, border controls and security of travel and identity documents in these two territories by proposing a visa exemption for holders of passports issued by the Hong Kong and Macao SARs (Special Administrative Regions).[46]

The other big move from the black to the white visa list took place in 2006 and involved a group of six countries (Antigua and Barbuda, Bahamas, Barbados, Mauritius, Saint Kitts and Nevis and the Seychelles) which had been on the visa list only since 2001. No special report is cited in the Explanatory Memorandum to the Commission proposal but two groups of justification are outlined. The first is linked to the criteria of recital 5 of the 2001 Visa Regulation. The Commission concludes that the imposition of the visa requirements for those states is no longer justified on several grounds: statistics or other information confirming that the countries do not represent a risk in terms of illegal immigration and public policy, regional coherence

[45] Possibly these are visa exemption agreements, but no further information is provided.
[46] See p.10 of the initial proposal of the Commission, Commission of the European Communities, Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 27 final, Brussels, 26 January 2000 and p. 5 of the amended proposal, Commission of the European Communities, Amended proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 577 final/2, Brussels, 01 October 2000.

and the Union's international relations. In addition to this assessment, the Commission also looked at the visa policy of Ireland, the United Kingdom and Switzerland, which apparently had drawn similar conclusions regarding illegal immigration and public policy criteria.

Thus the Commission proposed the move of these six countries from the back to the white list. However, the visa exemption was to apply not as from the date of the entry into force of the 2006 amending regulation but as from the date of entry of a visa exemption agreement with these countries aimed at ensuring reciprocity and the benefit of the visa exemption for nationals of all Member States. After three years of negotiations, the Council adopted a Decision on the signing and provisional application of the six agreements, on 30 March 2009.

3. Applying the criteria in practice: Bulgaria, Romania and the Western Balkans

3.1. The case of Bulgaria and Romania

Bulgaria and Romania were the first two countries to be removed from the visa black list (after its full communitarization in 2001) and for which there exists abundant material on the reasons for the decision in the form of public reports drafted by the Commission.[47] Therefore, they represent cases of special interest. The Explanatory Memorandum of the Commission enumerates and comments the set of measures deemed essential for the removal of a country from the visa black list. This set of measures was also used for other countries and became a de facto 'road map' towards visa liberalization. The generalization of this approach will be discussed in more detail below.

The objective here is to identify the potential elements of such a road map and to link them to the criteria previously identified by the Commission. In order to do this, a detailed analysis of the two reports will first be offered, followed by some reflections on the disadvantages of some elements of the approach taken by the EU.

[47] In 2001 Hong Kong and Macao were also moved from the black to the white visa list. However, as mentioned above, in these cases the Commission did not make any analysis of the reasons but simply stated that this action is in response to "the legal situation and the provisions relating to immigration, border controls and security of travel and identity documents".

3.1.1. 1995: The imposition of visa requirements

Following a unanimous decision in September 1995 by the Justice and Interior Affairs Ministers of the European Union, the citizens of two candidate countries, Bulgaria and Romania, were subjected to visa requirements when wishing to enter the Union. The main factors that influenced the decision were security and illegal immigration but they were documented in detail.[48] However, while defending the decision, the European Commission and Council representatives underlined that the position of the two countries could be changed following positive developments in their security conditions. Some idea of what those security conditions might be became clear in March 1996, at the joint meeting between the EU Justice/Internal Affairs Council and the Justice and Interior Ministers of the associated countries of Central and Eastern Europe. According to the Bulgarian Minister of Interior at the time, what was recommended in a report by the European Commission envoy to ten of the associated countries was: "tightened border controls, streamlined immigration policy and interdiction of the traffic in stolen cars, guns and strategic raw materials and of illegal emigration".[49]

The decision placed Bulgaria and Romania in a particularly unusual situation in relation to the other accession countries from Central and Eastern Europe, which remained on the white list. Over the next six years the European Union demanded substantial concessions only from Bulgaria and Romania on a wide variety of issues relating to borders and movement of persons as the price for removing the visa requirement.[50]

[48] "European Dialogue", *Politics and Current Affairs*, January-February 1996.
[49] "Bulgaria's Position on the visa black list meets understanding", *Bulgarian Telegraph Agency*, 2 March 1996, available at http://www.b-info.com/places/Bulgaria/news/96-03/mar22.bta.
[50] E. GUILD, op. cit., p. 38.

3.1.2. 2000/2001: lifting of visa requirements

On 1 December 2000,[51] the Justice and Home Affairs Council reached a political agreement on the Commission's proposal for a "Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders, and those whose nationals are exempt from this requirement." The agreement also included the removal of Bulgaria and Romania from the visa black list. However, while Bulgaria was included unconditionally on the white list (following a report by the Commission), for Romanian nationals the visa exemption was to come into force at a later date to be decided by the Council, following reports by the Commission setting out the information Romania was prepared to give in relation to illegal immigration and residence, including arrangements for repatriation.[52] The Commission submitted three reports in total, related to the measures taken by Bulgaria and Romania (one report on Bulgaria[53] and two reports on Romania).[54]

In the Explanatory Memorandum to the 2001 Visa Regulation, the Commission identified two reasons for its Proposal to remove the two countries from the visa black list. These were:

> - in recent years, both have paid special attention to a number of matters that are particularly important for the visa rules (e.g. border controls, security of travel documents, new readmission agreements and a review of existing agreements) and have achieved what can be regarded as generally satisfactory progress, albeit at different rates;
>
> - the enlargement process is now entering a decisive phase since the Helsinki European Council on 10 and 11 December 1999, and acting on a Commission recommendation, has decided to open negotiations with, among others, Bulgaria and Romania. This new situation which reflects the qualitative leap forward in the relations between Bulgaria and Romania and the European Union, is a new factor in terms of international relations.[55]

[51] The Commission Proposal was submitted on 26 January 2000.
[52] Art. 8 (2) of Council Regulation No 539/2001, op. cit.
[53] Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the regulation determining the list of third countries whose nationals must be in a possession of visas when crossing the external borders and those whose nationals are exempt of that requirement COM(2001) 61 final, 02 February 2001.
[54] Intermediate report on visa issues (Romania), COM(2001) 61 final of 2 February 2001 and Report from the Commission to the Council, "Exemption of Romanian Citizens from Visa Requirements", COM (2001) 361 final of 29 June 2001.
[55] Explanatory Memorandum to the Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals

The Commission also states that in this proposal it follows the recommendation by the European Parliament (Resolution of November 1995[56] and Legislative Resolution of February 1999 in the context of re-consultation on the Visa Regulation).[57]

The justification offered by the Commission attaches equal importance to both the measures adopted by the two countries and the development in the status of the countries themselves in their relations with the EU. Both these elements are studied separately for the two countries in an annex to this chapter. The fact that both elements have equal weighting is in contrast to the criteria offered in the 2000 Explanatory Memorandum of the Commission, which clearly puts less emphasis on international relations. This shows that for the EU foreign policy is generally of secondary importance unless the country concerned has a clear membership perspective. The case of the Western Balkan countries, which were moved to the white list in 2009, confirms this pattern.

3.1.3. The key role of the membership perspective

As was demonstrated above, sometimes the candidate countries for membership were faced with accommodating conflicting demands on the side of EU. One key conflict was between the adoption of a restrictive migration policy and human rights protection. However, other areas of conflict can also be identified. One of them was the conflict between stricter border controls and minority rights protection across the border (as already discussed for the case of Greece in Chapter 6.)

In assessing the concessions that Bulgaria and Romania were willing to make with their sovereign rights and policies, one should not forget their status as candidate countries. Especially after the decision in 1999 on the start of membership negotiations, there were a number of measures which the countries needed to adopt as part of the process of the adoption of the *acquis*.

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are exempt from that requirement, COM (2000) 27 final, Brussels, 26 January 2000, O.J. 2000, C 177E, pp. 66–69.

[56] In which the Parliament opposed the imposing of visa requirements on Bulgaria and Romania

[57] What the Commission refers to is the 1999 Visa Regulation.

For example, in the case of Bulgaria, within the EU accession negotiations process Bulgaria submitted Negotiation Position on Chapter 24 "Co-operation in the fields of Justice and Home Affairs"[58] on 20 February 2001 and opened negotiations on 1 July 2001. Bulgaria accepted the *acquis* in full under Chapter 24 and did not consider it necessary to request any derogations and transitional periods in the field of JHA. Bulgaria presented its Schengen Action Plan[59] to the European Union in November 2001.

Thus, the effect of the efforts toward the removal from the visa black list was simply the earlier adoption of some of the measures – aligning the visa lists, border controls, readmission agreements, measures on asylum and immigration. In these particular fields it is even possible that Bulgaria and Romania, despite their delay in the accession process, were effectively front-runners in the application of the *acquis*.

3.1.4. Elements of a road map?

On the basis of the experience of Bulgaria and Romania, it would seem that the following elements could constitute a 'road map' to the removal from the visa black lists:

1. Unilateral abolition of visas for citizens of the European Union;
2. Signing of readmission agreements with the Community;
3. Alignment of visa policy, especially the black visa list;
4. Changes in the legal regulation of migration policy.
5. Improving the quality of the passports;
6. Strengthening border controls.

But did the Commission indeed use such road maps as a form of visa conditionality resembling the accession conditionality? Indeed, in the relations with the Western Balkan countries, such road maps were developed with very precise benchmarks, possibly leading to visa liberalization or at least to its political feasibility.

[58] Negotiation Position of the Government of the Republic of Bulgaria on Chapter 24 "Justice and Home Affairs", CONF-BG 9/01, 20 February 2001.
[59] Action Plan for the Adoption of the Schengen *Acquis*, CONF-BG 73/01, 21 November 2001. The Plan is updated annually and the latest version is available on the website of the Ministry of Interior (www.mvr.bg).

3.2. The case of the Western Balkans[60]

In the case of the Western Balkans the issue of short-term visas had a clear political framework. The conclusions of the EU-Western Balkans Summit held in Thessaloniki on 21 June 2003 confirmed that the perspective of visa liberalization for the Western Balkan countries was a goal linked to the progress of the countries concerned in implementing major reforms in areas such as the strengthening of the rule of law; combating organized crime; corruption and illegal migration and the strengthening of their administrative capacity in border control and security of documents. This political commitment was followed by the negotiations and conclusion in 2007 of visa facilitation agreements with Albania, Bosnia and Herzegovina, FYROM, Montenegro and Serbia and simultaneously of readmission agreements, which, in the words of the Commission[61] put in place "clear rules for combating illegal immigration".

The tool used by the Commission for its final assessment is called "visa liberalization dialogue". In order to set up the methodology of the process, the following elements were taken into consideration:

- the European perspective of the Western Balkan countries
- the political commitment made on the liberalization of short-term visas,
- the conclusion by all five countries of a Community readmission agreement
- the visa exemption granted to all EU citizens by the countries concerned.

The Commission further outlined the process in its Communication on enhancing the European perspective for the Western Balkan countries of 5 March 2008[62] and noted

[60] For an overview of the problems with visas of the Western Balkan countries, see International Crisis Group, "EU Visas and the Western Balkans", *Europe Report*, n. 168, (2005); BALDWIN-EDWARDS, "Visa policies in South Eastern Europe: a hindrance or a stepping stone to European integration?", *East West Institute Policy Brief*, November, (2006); and TRAUNER, "EU Justice and Home Affairs Strategy in the Western Balkans: Conflicting Objectives in the Pre-Accession Strategy", *CEPS Working Document*, n. 259, (2007).

[61] See Explanatory memorandum of the Proposal for a Council Regulation amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2009) 366 final, Brussels, 15.7.2009

[62] COM (2008) 127, 5.3.2008

again that "moving towards a visa-free regime is, for all the countries of the region, part of their preparations for EU membership".

Following the launch of the visa dialogues[63] with Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia in early 2008, the European Commission formulated close to 50 requirements that it wanted the countries to meet in order to qualify for visa-free travel. These are listed in the so-called 'visa road maps'. Serbia was the first country to receive its road map on 7 May 2008, and Bosnia the last on 5 June 2008.

Roadmaps for each of the five countries concerned were established by the Commission in agreement with the Member States and in consultation with the respective country. The objective was for the roadmaps to identify all the measures to be adopted and implemented by each of the Western Balkan countries and to set out clear requirements to be achieved. The roadmaps were divided into four sets of issues: document security; illegal immigration; public order and security and external relations items linked to the movement of persons.

The visa road maps are almost identical, but they take into account the specific situation in each country, in terms of existing legislation and practice. The conditions range from purely technical matters, such as the issuance of machine-readable passports with a gradual introduction of biometric data (including fingerprints), to the adoption and implementation of a raft of laws and international conventions, to very broad matters such as progress in the fight against organized crime, corruption and illegal migration. Most of the requirements are part of the *acquis* on Justice and Home Affairs, which candidate countries have to implement before they can accede to the EU. However, there are a few additional conditions, mainly concerning human rights issues and the visa facilitation and readmission agreement.[64]

The visa road maps are divided into two parts: requirements related to the implementation of the visa facilitation and readmission agreements; and requirements

[63] See for example RAPID, "EU Commission Vice-President Franco Frattini in Tirana to launch visa free travel dialogue with Albania", *EU press release*, 6 March 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/398&guiLanguage=en.
[64] For details on the visa facilitation agreements, see Chapter 8.

on document security, illegal migration, public order and security and external relations. The second part loosely follows the issues that 2001 Visa Regulation mentions in its recital (5):

> The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity.

The Western Balkan countries concerned submitted their "readiness reports" in the autumn of 2008. They were followed by a Commission assessment. A second round of exchange of information took place in the spring of 2009 and the Commission presented its final assessment in May 2009. The Commission assessment allows the evaluation of the extent to which the countries have achieved the benchmarks of the road map and, respectively, the criteria for a visa-free regime.

On the basis of the assessment reports presented to the Western Balkan countries in June 2009, the Commission concluded that FYROM had met all the benchmarks set out in the road map. For two countries, Montenegro and Serbia, important progress had also been achieved with only a limited number of benchmarks remaining open,[65] while for two other countries, Albania and Bosnia and Herzegovina, despite the considerable progress made, a series of benchmarks were still open.

When the Commission made its legislative proposal for the amendment of the Visa List Regulation (Council Regulation 539/2001) and the transfer of FYROM, Montenegro and Serbia from the negative to the positive list, it confirmed that the proposal reflected the outcome of the process of visa liberalization dialogue and took

[65] Those included in the case of Montenegro – effective implementation of the Law on foreigners, in force since January 2009, the definition of sustainable solution regarding the status of displaced persons and internally displaced persons, including access to identity documents and the strengthening of capacities in the area of law enforcement and the effective implementation of the legal framework for the fight against organized crime and corruption, including through allocation of adequate financial, human and technical resources. For Serbia, the remaining benchmarks included: the improvement of cross-border/boundary surveillance, which includes in particular the exchange of information with EULEX/Kosovo police; the effective implementation of the Law on Foreigners in force since April 2009 and the adoption of the Migration Management Strategy; the effective implementation of the legal framework for the fight against organised crime and corruption, including through allocation of adequate financial and human resources; the integrity and security of the procedures followed in issuing new biometric passports to persons residing in Kosovo. See COM (2009) 366, op.cit.

into account, on the one hand, that the Visa Facilitation and Readmission Agreements with the countries concerned were implemented in a satisfactory way and, on the other hand, the respective visa and entry refusal rates for their citizens. The Commission thus introduced new criteria into its assessment which were not explicitly mentioned among those of recital 5 of Council Regulation 539/2001 - criteria that resembled those used by USA and Canada when determining the visa status of a country.

Moreover, the visa liberation liberalization to the above mentioned three countries is in a way limited by a technical requirement, as the visa waiver applies only to those citizens holding the new biometric passports issued by each of these states.

When the Commission submitted its official proposal in the summer of 2009, it used the "road map process," thereby possibly creating a precedent that was applicable not only to EU candidate countries but also to other countries from the EU neighbourhood. Therefore, the next section will explore the actual position of the various neighbours of the EC in relation to these criteria.

4. The visa list and the new neighbours

The main groups of countries which could feel adverse effects upon accession have already been identified. They can be divided into three main groups: candidates for membership or in the process of becoming candidates (Croatia, Turkey, countries of the Western Balkans); countries on the eastern external border of the Union (Ukraine, Moldova, Belarus and Russia) and countries on the southern external border of the Union (South Mediterranean countries).

4.1. Current visa status of the neighbours

All neighbouring countries of the EU, with the exception of one, Croatia, were subject to visa requirements until December 2009. Croatia avoided being put on the visa black list during the Balkan wars of the 1990s mainly due to its close relations with Italy and Germany. Three other Balkan countries were taken off the black list as of December 2009: Serbia, FYROM and Montenegro.

The group of candidate states and those in the process of becoming candidates have a clear perspective of joining the Union, even if the prospective accession dates might be in the distant future. They either negotiate (as Croatia and Turkey), are party to Stabilization and Association Agreements or are in a process of negotiating such an agreement. Thus, as part of the obligations they need to undertake on the way to accession, several measures are linked to the conditions for visa-free status, e.g. alignment of visa policy; readmission agreements; strengthening of border controls and changes in the national migration policy. Such requirements place these countries in a position similar to that of Bulgaria and Romania at the time of their removal from the visa black list.

The second group of countries includes all other European countries and is quite diverse. One subgroup includes Ukraine, Moldova and possibly Georgia, which have stated their intention to pursue the goal of membership but so far have not obtained a concrete and positive reaction from the EU. However, these countries are already members of the Council of Europe and can thus be considered as sharing the basic values on which the European Union is built. Thus, if they need to apply some of the measures identified as necessary for the removal from the visa black list, one would consider that it should not be particularly difficult.

Russia is a special case and is the only country that insists on having a special relationship with the Union, outside of the general framework of the European Neighbourhood Policy to which the remaining countries belong. However, such cooperation could include aspects related to visa policy, especially considering the special status of Kaliningrad. As for Belarus, at the present time it is difficult to imagine any positive development.

The third group of countries consists of the southern Mediterranean, countries which also form part of the European Neighbourhood Policy, are seen mainly as partners without any perspective or expressed wish for EU membership. With some of them, such as Morocco, there is a long history of association agreements; however those have never included any provisions related to visas. Moreover, not being party to the Council of Europe, their incentive to adopt specific legislative measures with a link to possible removal from the visa black list is significantly smaller. Their position has

also not changed substantially as a result of the enlargement process, as the latest enlargement was mainly towards the east.

4.2. Demands for visa-free travel

Most of the countries mentioned above have expressed their dissatisfaction at the political level at being on the visa black list; some are more explicit than others but at almost every bilateral or multilateral meeting between the EU and the countries concerned, the issue of visas is raised. Usually the demands are two-fold; as a first option a removal of the country from the visa black list is demanded; as an alternative, demands about the facilitation of travel of certain groups of persons is requested.

Nowhere is this approach more visible than in the case of the first group of countries (Western Balkans, Croatia and Turkey). Aside from the official statement and request on a governmental level, the issue of visas has found its place in a report by an independent International Commission on the Balkans, chaired by Giuliano Amato. This report[66] recommends a two-track approach. On one level, the report advocates that: "the EU should announce that the four Western Balkan countries will be exempt from visa requirements once they have met specific conditions". At a second level the Balkans Commission proposes a preferential regime for certain social groups. Special attention is paid to students, possibly through a special Balkan Student Visa Programme, especially in light of the finding by the Balkans Commission that 70% of the students in Serbia have never travelled abroad.

4.3. What does the EU offer?

What is the response of the EU to these demands? Despite the fact that the Commission has the competence to propose modifications to the visa black list, it has stated on several occasions that this is not considered a realistic option at the moment.[67] Instead the Commission prefers to concentrate on relatively marginal policy tools, the most significant of which is "visa facilitation,"[68] which is analyzed in detail in Chapter 8.

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[66] International Commission on the Balkans, "The Balkans in Europe's Future", (2005), p.34, available at www.balkan-commission.org

[67] Commission Communication on a common policy on illegal immigration, COM(2001) 672 final, 15 November 2001, para 4.1.1; and The Hague Programme.

[68] Others include initiatives for facilitation of local border traffic.

4.4. The role of the European Neighbourhood Policy (ENP)

One should not forget that some of these developments now occur in the framework of the European Neighbourhood Policy. The original Commission Communication[69] stated as one of its aims the inclusion of the neighbours in the internal market, including the free movement of persons. The Commission stated that:

> Russia, the countries of the Western NIS and the Southern Mediterranean should be offered the prospect of a stake in the EU's Internal Market and further integration and liberalization to promote the free movement of – persons, goods, services and capital (four freedoms).[70]

Among the eight measures contained in the Communication with regard to free movement of persons, three deal with short-stay visas: facilitating the movement of citizens of neighbouring countries participating in EU programmes and activities; visa-free access to holders of diplomatic and service passports and ultimately the wider application of visa free regimes.

These measures are further translated into the Action Plans for specific countries, where the covered field is defined as "visas for short stay".[71]

Table 10.4. Specific Action on Visa Facilitation and Readmission in ENP Action Plan

Country	ENP Action Plan	Specific action on visa facilitation in ENP Action Plan
Algeria	No	
Armenia	Yes	"exchange views on visa issues"
Azerbaijan		"exchange views on visa issues"
Belarus	No	
Egypt	Yes	"Cooperate in the field of improving the movement of persons, including to facilitate the uniform visa issuing procedures for certain agreed categories of persons"
Georgia	Yes	"exchange information on visa issues"
Israel	Yes	No short-stay visa requirements
Jordan	Yes	"In order to facilitate the circulation of persons, examine… possibilities of facilitation visa issuing (simplified and accelerated procedures in conformity with the *acquis*)"

[69] Commission Communication "Wider Europe – Neighbourhood: A New framework for Relations with our Eastern and Southern Neighbours", COM (2003) 104 final, 11 March 2003.
[70] Ibid., p.4.
[71] For an analysis on the provisions of the Action Plans see TRAUNER AND KRUSE, "EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood", *CEPS Working Documents*, n. 290, (2008), available at http://shop.ceps.eu/BookDetail.php?item_id=1646.

Lebanon	Yes	"Cooperate on facilitating the movement of persons…in particular examining the scope for facilitating visa procedures for short stay for some categories of persons"
Libya	No	
Moldova	Yes	"Initiate a dialogue on the possibilities of visa facilitation"
Morocco	Yes	"constructive dialogue…including examination of visa facilitation"
Palestinian authority	Yes	No specific action
Syria	No	
Tunisia	Yes	"facilitating the movement of persons…by looking in particular at possibilities of relaxing short-stay visa formalities for certain categories of persons"
Ukraine		"establish constructive dialogue on visa facilitation"

Source: Trauner and Kruse, "EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood", *CEPS Working Document*, n. 290, (2008).

The table shows that concrete actions in this field differ from country to country, despite the fact that in principle, each neighbouring state is equal in that all are eligible to conclude an EC visa facilitation (and readmission agreement). The clauses used for the domain of visas are rather general, such as "establishing constructive dialogue" or "exchange views". The factors taken into account for the decision to open negotiations are outlines in the "Common approach on visa facilitation"[72] of December 2005 stating:

> The EC should take account of the following factors inter alia in deciding whether to open negotiations on visa facilitation with third countries: whether a readmission agreement is in place or under active negotiations; external relations objectives; implementation record of existing bilateral agreements and progress on related issues in the area of justice, freedom and security (e.g. border management, document security, migration and asylum, fight against terrorism, according to the standard counterterrorism clause agreed by COREPER on 6 March 2002, organized crime and corruption); and security concerns, migratory movements and the impact of the visa facilitation agreement.[73]

Based on the above criteria, the Commission suggested that three countries in particular meet these pre-conditions: Georgia, Armenia, and Azerbaijan.

[72] See Chapter 8 for a detailed analysis.
[73] Cited in the European Commission Non-paper, "Expanding on the Proposals contained in the Communication to the European Parliament and the Council on 'Strengthening the ENP', COM (2006) 726 final of 4 December 2006: ENP – Visa Facilitation", available at: http://ec.europa.eu/world/enp/pdf/non_papr_visa_facilitation.pdf.

Among the countries of the ENP, one can thus distinguish several groups in relation to their status on visa policy. A first group includes countries which have visa facilitation agreements in force and already started a dialogue with the EU on the liberalization of the visa regime. This group includes Ukraine[74] and Moldova. From the Eastern neighbours which are not part to the ENP, Russia[75] is also conducting such a dialogue. One should also note that Russia is the only country officially negotiating a visa-free regime with the EU on symmetrical terms – EU citizens still need visas in order to enter the territory of Russia while other countries holding "visa dialogue" including Ukraine unilaterally lifted visa obligations for EU citizens.

A second group includes ENP countries which are in the process of negotiations of visa facilitation agreement; in this group fall Georgia[76] and potentially Azerbaijan.

Interestingly enough, all the above-mentioned countries form part of the Eastern Dimension of the ENP while the Mediterranean countries are underrepresented.

4.5. Beyond the neighbourhood

The cooperation on visas is also spreading beyond the EU neighbourhood, although only in the form of visa facilitation – readmission agreement form. This is occurring in the framework of the "global approach on migration'. The Commission is elaborating the latter concept through a whole set of new measures on irregular and legal migration, focusing in geographic terms on Africa and the Mediterranean region. Under the heading "Legal Migration", the establishment of "mobility packages" with a range of interested third countries was recommended:

> There is a clear need to better organize the various forms of legal movement between the EU and third countries. Mobility packages would provide the overall framework

[74] See "Visa Dialogue between Ukraine and EU: Models and Perspectives", Європейський простір: портал проєвропейського громадянського суспільства України [European space: portal of the pro-European civil society in Ukraine], 07 April 2009, available at http://eu.prostir.ua/library/233920.html.
[75] The dialogue on visa free regime introduction between Russia and EU was launched during the meeting of EU-Russia Permanent Partnership Council on freedom, security and justice on April 23-24, 2007 in Moscow when "The Visa Dialogue Procedure to Examine the Conditions for Visa-free Travel as a Long Term Perspective" was approved.
[76] RAPID, "Commission recommends the negotiation of Visa Facilitation and Readmission Agreements with Georgia", *EU press release,* 25 September 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1406&format=HTML&aged=0&language=EN&guiLanguage=en.

> for managing such movements and would bring together the possibilities offered by the Member States and the European Community, while respecting the division of competences as provided by the Treaty.[77]

This mobility packages, or "migration partnerships", would then be designed to manage legal migration flows with selected third countries, particularly from the neighbourhood, provided that they prove willing to cooperate on readmission, irregular migration and border management. Facilitated travel is only one element of the packages, which also include ideas on promoting circular migration (temporary or seasonal migration) and legal migration based on the labour needs of interested EU Member States. Inevitably, the negotiations of such agreements will also bring to the fore certain problems of competence as their scope encompasses both EC and Member State competence.

Thus, the visa facilitation and readmission agreements (which do not mention visa liberalization even as a long-term objective), will be only part of a comprehensive cooperation on migration issues. However, in exchange for receiving new opportunities for legal migration, the third countries concerned will have to agree on far-reaching, but probably meaningless commitments including measures "to promote productive employment and decent work, and more generally to improve the economic and social framework conditions […] as they may contribute to reducing the incentives for irregular migration".[78]

So far, the approach with regard to visa facilitation has been applied only once in relation to the Cape Verde. The Commission was given a mandate to negotiate a visa facilitation and readmission agreement with this country in June 2009.

5. Turkey and the effect of prior commitments: The *Soysal* case

The case of Turkey has not yet been mentioned. Similarly to the Western Balkan states, it is both a neighbour sharing a land border with the EU (since 1980 with

[77] Communication from the Commission to the Council and the European Parliament, "The Global Approach on Migration one year on: Towards a comprehensive European migration policy", COM (2006) 735 final, Brussels, 30 November 2006.

[78] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions "On circular migration and mobility partnerships between the EU and third countries", COM (2007) 248 final, 16 May 2007, p. 4, cited in TRAUNER AND KRUSE, op. cit.

Greece and now also with Bulgaria) and a candidate country for EU membership (for even longer than the some of the current EU members). In terms of its visa status, Turkey has been on the common visa 'black' list since its first drafting in the Maastricht era[79] and remains there to date.[80] However, this situation has recently been challenged by the *Soysel* judgment[81] of the European Court of Justice.

5.1. The case

The case, a reference for a preliminary ruling from a German administrative court, concerns the interpretation of the "standstill clause" of Article 41 (1) of the Additional Protocol to the EC-Turkey Association Agreement[82]. In particular, it raises the question of whether this "standstill clause" precludes the visa requirement established by the German national law and "Article 1(1) of Regulation No 539/2001 even though that visa requirement did not exist when the EC-Turkey Protocol first came into force in Germany". The German court asks whether the "standstill clause" should be interpreted to mean that the Turkish nationals in the main proceedings (Turkish nationals working for a Turkish undertaking and providing services in Germany) should not be required to have a visa to enter Germany.

The Additional Protocol of 1970,[83] in its Article 41 (1) provides that "the contracting parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services"[84].

The question arose in the context of proceedings brought by two Turkish nationals (Mr. Soysal and Mr. Savatli), against Germany in respect of the requirement for

[79] Council Regulation 2317/95, op.cit., later replaced by Council Regulation 574/99, op.cit.
[80] Council Regulation 539/2001, op.cit., and its subsequent amendments.
[81] Case C-228/06 *Soysal* [2009] ECR I-0000. For an analysis in the context of EC immigration law, see S. PEERS, "EC immigration law and EC association agreements: fragmentation or integration" *European Law Review* (2009) 34, p. 628-638. For an analysis in the framework of the jurisprudence of ECJ on the EC-Turkey Association Agreement, see N. TEZCAN/IDRIZ, "Free movement of persons between Turkey and the EU: to move or not to move? The Response of the Judiciary" *Common Market Law Review* 46: 1621-1665, 2009. For an earlier review of the impact of the agreement on migrant workers, see E. GUILD, "EC law from migrants' perspective", op.cit.
[82] The agreement, also known as the Ankara Agreement, was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, OJ 1977 L 361, p. 600.
[83] OJ 1977 L 361, p. 600.
[84] The Court of Justice has already confirmed that the "standstill clause" has direct effect (see among others Case C-37/98 *Savas* [2000] ECR I-2927, paragraphs 46 to 54 and 71, second indent) and that it applies to entry controls
Case C-16/05 *Tum und Dari* [2007] ECR I-7415, paragraph 69).

Turkish lorry drivers to obtain visas in order to provide services consisting in the international transport of goods by road. The case was brought when the German authorities refused to issue a visa when these Turkish nationals (working in an international transport for a Turkish undertaking) were supposed to drive a lorry registered in Germany.

The ECJ ruled that Article 41(1) of the Additional Protocol is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

5.2. Specific issues

5.2.1. Admissibility

The German government challenged the admissibility of the case on the grounds that the reference is not made by a final court, as required in the field of Title IV EC by Article 68(1) EC even though the questions referred concern the validity of a Council regulation adopted on the basis of Title IV of Part Three of the EC Treaty (paragraph 38).[85]

The Court responded that "the wording of the questions referred … shows, in and of itself, that the questions concern, explicitly and exclusively, the interpretation of the law governing the association between the EEC and Turkey." (paragraph 40). The Court took that position, despite the fact that the Community secondary legislation (Council Regulation No 539/2001) was explicitly mentioned in its question by the national court. The decision on admissibility is criticized by Peers and its possible wider impact is considered in his case note, cited above.

[85] The admissibility issue is no longer relevant in this particular field, as under the Lisbon Treaty the limitation on lower courts to ask for a preliminary ruling in the field of visas does not exit.

5.2.2. The visa requirement

After reviewing the earlier case law on the "standstill clause", the Court focused on whether national legislation that introduced substantive and/or procedural conditions for Turkish nationals wishing to gain access to the territory of a Member State or to a professional activity, which were stricter than those that had applied to them in the relevant Member State at the time of the entry into force of the Additional Protocol, could be considered to be new restrictions within the meaning of Article 41 (1) of that protocol (paragraph 50).

The Court accepted the Commission's argument that Schengen visas have "certain advantages compared with the conditions that applied in Germany, at the time of the entry into force of the Additional Protocol in that Member State." Whereas beforehand the right of access was limited only to the German territory, now the Schengen visa gives access to the entirety of the Schengen space (paragraph 54).

Despite this, the Court ruled that national legislation that makes the exercise of the right of freedom to provide services conditional upon issuing a visa was liable to interfere with the actual exercise of that freedom, particularly because of the additional and recurrent administrative and financial burdens involved in obtaining a visa, which was valid only for a limited time. In addition, where a visa is denied, the exercise of that freedom is prevented entirely (paragraph 55). Thus, the Court concluded that legislation such as that at issue in the main proceedings constitutes a "new restriction", within the meaning of Article 41(1) of the Additional Protocol, of the right of Turkish nationals resident in Turkey to freely provide services in Germany (paragraph 57).

5.2.3. The link international agreements-EU secondary law

The German Court noted in its reasoning for asking the questions that the wording of Article 41 (1) of the Additional Protocol, refers to the "Contracting Parties" and thus could support the argument that the "standstill clause" in that provision applies not only to the rules of the Member States but also to those under secondary Community legislation. The ECJ has not yet ruled on the matter (paragraph 36).

After finding that legislation such as that at issue in the main proceedings constitutes a "new restriction" within the meaning of Article 41 (1) of the Additional Protocol, the Court states that this conclusion cannot be called into question by the fact that the legislation currently in force in Germany merely implements a provision of secondary Community legislation (paragraph 58). To that end, the Court recalls that: "the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.

5.3. Consequences of the judgment

The judgment is, in principle, clear on the issue of who should benefit from the standstill clause and should thus be exempted from visa requirements; namely service providers (a group that can further be limited by the application of additional conditions, e.g. employed by a Turkish company). In practice, however, it is not clear how this category can be identified. It seems difficult for somebody who appears directly at a border crossing point to prove to the border guard that he/she is a service provider.[86] Moreover, within the EU the rights of service providers have also often been applied by analogy to service recipients, for example tourists, patients, etc.[87] [88]

The geographical scope of the judgment is also clear, in principle: Member States which are bound by the Protocol and which on the date it entered into force for them did not have visa requirements for Turkey. According to the Commission[89]only Germany and Denmark are in this situation. New Member States are excluded a priori, as they had to impose visas prior to accession while the protocol applies to them as of the date of accession (see Chapters 2 and 7 for further details on this).

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[86] The Commission addresses this issue in the Guidelines to border guards, which are being prepared. However, these guidelines are not public.

[87] Not surprisingly Turkish scholars argue that everybodyy should benefit from this judgment (see TEZCAN/IDRIZ, op. cit. However, this would be warranted only if one could argue that the visa requirement is also an obstacle to the free provision of services by German (or in general EU) service providers to Turkish citizens coming as tourists. See also: http://www.euractiv.com/en/enlargement/professor-visas-turkish-citizens-spirit-eu-integration/article-186844.

[88] The Court did not elaborate whether its finding also applies other conditions (fees, support documents requested).

[89] Answer to a written question by Commissioner Barrot, see: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-3747&language=DE#def3

Another interesting issue raised by this judgment is the position of the Community. The Community itself is a contracting party to the EC-Turkey Association Agreement; and hence it should also be bound by the standstill clause. One could thus argue that putting Turkey on the EC visa black list in 1995 constituted a breach of this standstill clause. The same argument would of course apply to the subsequent versions of the black list, including the 2001 Visa Regulation. However, the EC did not even have a common visa policy at the time the standstill clause came into force (1970). But it does not follow from this that the standstill clause does not apply to the EC as well, since the purpose of this clause is clearly to prevent the contracting parties from introducing any new measures which could hamper the freedom to provide services across the EC-Turkey border.

However, the Court did not address this issue as the question of the validity of the 2001 Visa Regulation with respect to Turkey was not directly raised by the German court.

After this judgment, it will be difficult to make the visa black list consistent with the EC-Turkey standstill clause unless Turkey is put on the visa white list of the EU. In effect the German authorities are in a difficult situation: on the one had the ECJ has ruled that their visa requirements for Turkish nationals (at least for service providers) are not compatible with a prior international commitment of Germany. On the other hand, Germany is also bound by the common visa policy, under which Turkey is on the black list. The primacy of international agreements over internal secondary legislation implies that Germany (and Denmark) have no choice but to change their visa requirements for at least some categories of Turkish citizens. Germany's visa requirements will thus be different from those of other Member States.

German sovereignty to determine its own visa policy was thus constrained from two sides: its obligations under the common visa policy of the EU and the EC-Turkey Agreement. However, Germany had agreed to limit its sovereignty in both cases. In 1970, when it agreed to become a contracting party to the Additional Protocol to the EC-Turkey Association Agreement and later when it agreed to the creation of the common visa policy with its black list. The problem highlighted by this ruling is that these two transfers of sovereignty can lead to conflicting obligations.

The practical consequence of this ruling seems to be that following the initial guidelines from the Commission, it will be implemented in its narrowest possible sense, namely that the 2001 visa black list is "interpreted in a manner that is consistent with" [90] the EC-Turkey Association Agreement. In practice, the Border Manual will thus have to specify that Turkish citizens who intend to provide services can lawfully enter Germany (and Denmark) if the purpose of the visit is to provide services (for a Turkish undertaking). This is another example of the fragmentation of the common visa policy in practice that has been illustrated in previous chapters.

6. Conclusions

This chapter has illustrated the evolution of the common visa lists (both positive and negative). Initially they were not even made public, then their composition was published, but the criteria for putting countries on one or the other list were not specified until 2001 when these criteria were also published and explained. Since 2001, these criteria have been refined and one can see how they have been applied in practice. Through the publication and elaboration of the criteria, a potential was created for the development of 'road maps' for visa liberalization under which neighbouring countries know what steps they have to undertake in order to achieve visa-free travel within the EU. This approach seems to have worked in the case of Bulgaria, Romania and the Western Balkans.

Why was this early loss of sovereignty accepted by the EU's partners? One factor is simply that visa policy is highly asymmetrical: rich countries, like the EU, use visas to limit inward movement. By contrast, poorer countries are interested in widening the possibility of their citizens to travel, to their neighbours, but especially to large and rich countries. The way in which the EU can use its visa policy to induce neighbouring countries to undertake a host of internal measures (introduce new passports, align to the EU's black list, etc.) is a good example of how the pooling of

[90] The necessity to do this is clearly stated in paragraph 59 of the judgment, which recites "In this respect, it is sufficient to recall that the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (see Case C‑61/94 *Commission v Germany* [1996] ECR I‑3989, paragraph 52)."

sovereignty within the EU gives the Community much more political leverage than they would have had if visa policy had remained a national competence.

But can 'road maps' be used more generally? As mentioned above the key driver in the case of Bulgaria and Romania and the Western Balkans leading them to accept a long list of intrusive requirements was not only the desire to obtain visa-free travel, but also the perspective of membership. What countries in the neighbourhood (or further afield) have to do to open up this perspective is a fundamental decision the EU has to take. A road map for visa-free travel alone is unlikely to be enough.

Through the enlargement process the EU has achieved comprehensive political and economic stabilization for much of Europe. The challenge that remains is to obtain similar results with countries for which accession is a more distant prospect, or may not even be on the agenda.

The renewed emphasis on visa-free travel also came about also because the legal instruments explored in Chapter 8 proved to have only a limited effect. More recently, the ECJ Judgment in the Soysal case has drawn attention to another means of achieving at least partial visa-free travel, namely jurisprudence. More generally, this judgment shows that the EU has to be careful in issuing new regulations in fields that are newly communitarized, but in which there are pre-existing obligations for Member States and/or the Union itself.

CONCLUSIONS, POLICY RECOMMENDATIONS AND OUTLOOK

Visa policy has been one of the most dynamic fields of European integration over the last decade. Member States decided to pool together the essential elements of this field, albeit in a rather piecemeal way, once they recognized the need for an external dimension to an area of free movement of persons that consisted of a large and disparate group of countries with only limited trust in each other. This study shows that the Europeanization of visa policy was strongly influenced by enlargement, and this brought with it a number of problems not previously experienced by the early Schengen group.

The analysis of the interaction between enlargement and the Europeanization of visa policy shows that in a visa-free travel area, one type of conflict is bound to arise repeatedly: on the one side, the collective interests of the majority of Schengen states to secure their common external borders against illegal immigration and crime, and, on the other, the interest of an individual Member State to maintain the free movement of persons with the countries with which it has an important relationship. Member States have been quite pragmatic in allowing 'breaches' in the external visa 'frontier' (Portugal, Spain, Greece, Kaliningrad, local border traffic): different legal instruments were accepted as long as there were no significant 'spill-overs' for other MS (few repatriations of Brazilians, or Albanians; little abuse of local border traffic)

Various approaches were used within the legal framework of the Schengen *acquis* to address this problem (see Chapters 3 and 6). They range from special travel or national identity documents at the national level, to area-wide regulations concerning local border traffic and visa facilitation (see Chapter 8). The result of efforts to reconcile these conflicting interests has been an increasing fragmentation of the legal space. The most acute effect of this fragmentation can be seen in the case of Kaliningrad, whose residents could benefit from at least three different legal frameworks before leaving the country: special transit travel documents, local border traffic and visa facilitation.

This fragmentation is now part of the *acquis* and could possibly be addressed through codification. However, this seems unlikely as the scope of regulation of the different instruments is quite diverse.

Enlargement has also had positive effects, however. Countries such as Bulgaria and Romania, which not so long ago were on the black list of the EU, were able to obtain visa-free travel, then join the EU and may soon become full members of Schengen.

This concluding section starts with a summary of the lessons learnt from enlargement. It then turns to certain aspects of the decision-making process on visa lists that require reform, and closes with an outlook for the external recognition of the internal shift of competence in visa policy.

1. Lessons learnt from enlargement: a road map to visa-free travel?

The enlargement process seems to have been the best 'road map' to visa-free travel. The examples of Bulgaria, Romania and the Western Balkans shows that the perspective of membership works on both sides: the EU is willing to state the conditions for visa-free travel and prospective members are willing to fulfil them, although they curtail their sovereignty because they have the perspective of membership (see Chapter 10). Moreover, since the Western Balkans are now surrounded by EU members, they do not face the problems of the earlier candidates mentioned above.

Turkey seems to constitute a special case because its membership application is effectively still on hold. Moreover, it has a long-standing association agreement with the EU, which gives at least a certain group of its citizens a derived right to visa-free travel to at least some of the Member States (see the *Soysal* judgment discussed in Chapter 10). This judgment raises two broad issues:

The liberty of the EU (and of Member States) to impose visas can be limited by other (previous) international commitments.[1] This also applies more generally when a new policy field is Europeanized; that process can be constrained by previous

[1] See also Article 2(1)(b) of the Visa Code.

commitments stemming from different fields (in this case economic integration through a long-standing association agreement).

The second issue raised by the *Soysal* judgment is the compatibility of visa requirements with the freedom to provide services. Within the EU the freedom to provide services has been interpreted widely as applying not only to service providers, but also to recipients of services, e.g. tourists.[2] Will this wide interpretation also be applied in the case of Turkey? This issue is potentially significant as the EU tries to open markets for goods and services in general and with its neighbourhood in particular.

One open question is whether the 'road map' approach can also work for neighbours without a membership perspective. The basic criteria for removing a country from the black list were set out in the 2001 Visa Regulation and essentially concern three elements: illegal immigration, public policy and international relations. In practice, the elements were applied in different ways in the case of Bulgaria and Romania and the Western Balkans. The contribution of the Commission to the Stockholm Programme[3] includes elements already used before, such as security of travel documents and the quality of border controls, but also adds further, more fluid requirements, such as the effectiveness of the fight against organized crime and respect for human rights.

The strong emphasis placed by the EU on the threat of illegal immigration (of Bulgarian and Romanian citizens to the EU) induced both countries to introduce administrative measures that meant that their citizens could be prevented from leaving the country if they had infringed foreign immigration or residency rules.

The numerical importance of these preventive measures was limited, and they did include the right to judicial review. Nevertheless, they must be questioned, as in effect they interfered with the fundamental rights of citizens of Bulgaria and Romania to

[2] ECJ, Joint cases C-286/82 and C-26/83 *Luisi and Carbone* [1984] ECR 377, Case C-186/87 *Cowan* [1989] ECR 195 and Case C-348/96 *Calfa* [1999] ECR I-11.
[3] Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen, COM (2009) 262 final, Brussels, 10.06.2009.

emigrate.[4] The right to leave one's country is guaranteed by the constitutions of both countries and by the European Convention on Human Rights. The protection of fundamental rights has always been a cornerstone of EU principles. But it seems that in this case the EU was de facto encouraging candidate countries to systematically infringe one fundamental right. This aspect of the experience of Bulgaria and Romania is thus certainly not to be replicated in other cases.

The use of a 'road map to visa-free travel' does not have to be limited to European or ENP countries. It could be applied to any third country, regardless of the character of its relations with the EU. However, inevitably, the incentives of countries not on the enlargement track to meet the criteria will be much weaker. Thus, the main difficulty in developing a set of criteria for visa liberalization is to find the minimum requirements necessary under the criteria of the Visa Regulation (illegal immigration, public policy, international relations) that are acceptable to all the EU partners at the same time.

However, one fundamental problem will always remain: in reality a road map can only lay out the necessary conditions a country has to fulfil to become eligible for visa-free travel. It is entirely possible that a country fulfils most conditions of a road map, but the EU might still refuse to accord it visa-free travel because illegal immigration could still be (or perceived to be) a problem.

In a democratic society governments only have limited powers over the tendency of their citizens to emigrate. If the local economy does not offer employment prospects, then no national administrative measure will be able to effectively limit illegal emigration. In the end, the decisive criterion for the EU remains its perception of the threat of illegal immigration. Ultimately, the key element of any comprehensive road map must thus be a certain minimum level of prosperity and economic stability. If this condition is not fulfilled, a limited set of legal and administrative measures concerning visas and migration will not be sufficient to induce the EU to offer visa-free travel.

[4] See Chapter 10.5 for a discussion of the limited jurisprudence on this issue.

Comprehensive economic and political stabilization is the underlying condition for the free movement of persons. It is unlikely that this can be achieved for countries over which the EU has little leverage, since for them accession is a more distant prospect, or possibly not even on the agenda.

The EU is now considering migration partnerships and visa liberalization road maps with many countries, most of which are not even prospective candidates for enlargement. The prospects of success in these cases must be much more limited than they were for the countries that had a clear membership perspective.

Visa facilitation, as opposed to visa-free travel seems a much more realistic goal, especially since this type of agreement is now being demanded by countries as far-flung and as important as China.

2. The decision-making process regarding visa lists: policy recommendations

A key element of sovereignty is the control over the movement of persons crossing the border. The establishment of lists of countries whose nationals need visas to enter the territory of a country is thus considered to be a key element of sovereignty. This element has now been fully communitarized.[5] But the way in which this has been done raises two issues that have so far not been fully researched:

1) What is the nature of the internal decision-making process?
2) Does the rest of the world recognize the transfer of sovereignty?

We now briefly discuss these internal and external aspects separately:

2.1. The internal decision-making process

In principle, the internal decision-making process was determined in the Treaty of Amsterdam (and changed under the Lisbon Treaty): the visa list(s) are determined by the Council deciding by QMV after having consulted Parliament. Under the Lisbon Treaty, this will be done with QMV in the Council and under the ordinary legislative

[5] For short-stay visas (allowing for a stay of up to three months); Member States can still decide on their own the conditions under which they issue long stay visas. However, short-stay visas constitute the bulk (around 90 %) of all visas issued by Schengen countries (see Chapter 1 for more details).

procedure together with the Parliament. We would argue that there are two aspects of the decision-making process which need reform, or at least clarification. These two aspects concern the elements on which the decision-making process is based, and the nature of the decision. In short: the criteria used to put a country on the black list need clarification, and the decision-making process regarding these criteria should be different from the decision-making process regarding the placing of each individual country on the black or white visa list.

i) The evaluation of the criteria for the black list

As mentioned above, the criteria used to put together the black and white lists were clarified only in the Explanatory Memorandum to the 2001 Visa Regulation. The scant information available (and the resulting list, see Chapter 10) suggests, however, that initially the criteria were de facto not really applied in a substantive manner. The resulting list seems to have been the simple intersection of the pre-existing national black lists, (i.e. in those cases where Member States could not reach a unanimous agreement, the country in question was put on the black list). This raises the question of how the criteria (threat of illegal immigration, crime and foreign policy considerations) are in reality evaluated: at the national or EU level? The Explanatory Memorandum accompanying the 2001 Commission proposal for the Council Regulation on the criteria for the black list is not explicit on this point. But the fact that in at least one case a country was put on the black list only because four Member States had found that this country did not satisfy the criteria (see Chapter 10) suggests that the decision was in the end based on national evaluations.

However, given that member countries have agreed to the transfer of sovereignty by agreeing to communitarize visa policy with the Treaty of Amsterdam (see Chapter 5), it follows that the criteria for the establishment of the black list should be evaluated at the EU level. In concrete terms, this means that it is not sufficient that any single Member State, or a small group, perceive a threat of illegal migration to put a country on the black list invoking the principle of solidarity. Only a threat of this happening to the EU as a whole should be decisive. The same should also apply to foreign policy considerations. For Spain, the overriding concern in relation to Columbia might be the desire to keep its traditional links with Latin America, but the question should be

whether this is also a key concern for the EU as a whole. In principle, it should be the task of the Commission to determine the balance of interests at the EU level. However, it appears that this is not done in reality, as the process leading to the Council Decision on the black list is preceded by a Commission enquiry with the Member States. If the decision was really based on an EU point of view, the Commission should conduct its own studies and not rely exclusively on the opinion of Member States. Some steps have been taken recently in this direction through the creation of networks among Member States providing information on issues such as illegal immigration, but so far they remain inter-governmental.

A comparison with the decision-making process in the Eurosystem is instructive: all members of the Governing Council of the ECB, even those heading national central banks, are supposed to base their vote only on euro area considerations. The decision-making process in the ECB is not preceded by a consultation with national central banks; instead the ECB conducts its own evaluation of the euro area economic and monetary conditions. National central banks furnish some background material, but their contributions are not taken as representing national points of view, but rather pieces of the overall picture. This is what should be done in assessing the criteria for the black visa list as well: the Commission should develop its own databases, analytical tools on immigration and threats to public security. National police forces and judiciary institutions would of course contribute to this effort. But the focus should shift from what is happening at the national level to the overall, EU-wide picture.

ii) Criteria versus single decisions

Chapter 9 has shown that in other countries (e.g. most notably the US) there exists a two-tier decision-making process: the criteria for inclusion on the black list (or equivalently the removal there from) are fixed in legislation, whereas the concrete country-by-country decisions are taken by the government. This makes sense: the legislature (Parliament) should fix the general criteria and the executive (the government) should execute them. At the EU level, one cannot find a similarly neat

analogy to distinguish the legislative and executive branches, but as the substance of the decision is different, a different decision-making process would be appropriate.

The criteria should be determined in the normal legislative procedure involving co-decision (now ordinary legislative procedure), but the application of these criteria in the country-by-country decisions on the composition of the black list should be left to the Council.[6] The present procedure is too cumbersome: any change in the visa black list, thus even removing a single country from it, requires a full legislative act. This means that the ability of the EU to use visa policy flexibly in its foreign policy will be greatly restrained. The example of the US is again instructive in this respect: the difficulties which arose with the US over the application of reciprocity might have escalated if the US administration had not been able to make the unilateral decision to remove some of the new Member States from its visa black list. It might thus be useful to consider a delegation of the competence to the Council to decide on the inclusion of individual countries on the black list.

3. An open issue: external recognition of the internal transfer of sovereignty

The key problem here is simply that the rest of the world does not necessarily recognize the shift of sovereignty that has taken place within the EU. Chapter 9 describes the problems that arise when third countries, especially large and powerful ones like the US, which still try to negotiate separately with Member States on key aspects of visa policy.

In the field of trade policy, for example, the situation is different because the Community and now the Union (together with the Member States) is a signatory to the WTO agreements, which implies that third parties have recognized the exclusive[7] competence of the Community and now the Union in this field. This implies that retaliatory measures (such as countervailing duties) can be imposed only at the EU

[6] EMU again provides an instructive analogy: the task of the ECB has been fixed in the Treaty: it is to preserve price stability. However, the ECB is totally free to set its policy instruments in the pursuit of this task.

[7] Visa policy is 'only' a shared competence (see Article 4 of the Treaty on the Functioning of the European Union (also called TFEU or Lisbon Treaty). In this area, the EU acquires exclusive competence in specific areas only by exercising the broad competence.

level.[8] In the area of trade policy it is thus not possible to have a situation like the one in the visa field, where third parties such as the US impose visa requirements only on some Member States, disregarding the EU competence in this area.

Air transport and a few other minor policy areas experienced a similar problem previously: the competence had moved to the European level, but Member States were still bound by existing bilateral agreements with third parties, which had to be induced to renegotiate the existing agreements with the EU. However, in these economic fields the partners of the EU did not really have a problem recognizing the transfer of sovereignty to the EU level in marginal policy fields. Visa requirements go to the core of sovereignty, however. In this field, third countries have naturally been more reticent to recognize the intra-European transfer of sovereignty.

It does not help that not all countries participate in the common visa policy. It is naturally somewhat confusing for a foreign power to recognize the EU as the single partner in negotiations on visa policy when these EU institutions cannot de facto represent all Member States. Even more confusing for outsiders is that the EU can in some matters also represent non-member countries in areas that touch on national security issues, which in the rest of the world would be considered as the core of sovereignty. This variable geometry of the Schengen space has made the full recognition by the rest of the world far more difficult.

Shifting competence within the legal order of the EU is thus only a first but necessary step towards the full transfer of power. Sovereignty in the wider global legal order has to be earned through the consent and respect of the global community. The external recognition of the transfer of competence still has to be fully achieved in the field of visa policy. This requires negotiating bilateral agreements one by one with the EU's main partners, as there are no multilateral treaties in the field of visa policy to which the EU could adhere. There is no doubt that the EU is on the way to becoming a major global actor in the field of visa policy, but as yet this chapter of the story remains unwritten…

[8] In the area of monetary policy as well, third countries recognize fully the shift of competence from national central banks to the Eurosystem.

4. Outlook

A constant theme of the Europeanization of visa policy discussed in this thesis has been that the composition of the black list is a 'sovereign' right, as is the decision to grant or not to grant a visa. The exercise of this sovereign right was initially based on the interests of individual Member States but became more and more based on the common interest of the Community and now the Union, that is, of all the Member States together. In this view of the world there is no universal right to visa free travel. The only case where one can detect a right of the citizens of third countries to visa-free access to the EU is in the *Soysal* case. However, even in this case, the right to visa-free travel seems to be granted only to a limited group and only as a corollary to an economic consideration. Moreover, the reaction of the Commission so far seems to be to interpret this ruling in the narrowest possible sense to limit the 'breach' it has created in the common visa policy.

This general attitude that visa policy is the exercise of a sovereign right is unlikely to change soon because determining who can enter the territory of a state instantly poses issues of public order and security; both areas that go to the heart of sovereignty. However, one recent development could lead to an important change in this respect. The recently enacted Visa Code provides in Article 32(3) for a right of appeal in case of refusal of a visa, albeit only applicable as of April 2011. Without this right of appeal officials of MS in consulates abroad maintain an incontrovertible sovereign right to refuse a visa to anyone they consider to be a potential danger. This right of appeal constitutes a potentially important innovation as for the first time it offers the possibility of a judicial review of what used to constitute the discretionary power of a consular official. Given that over 800 000 visa Schengen visa applications are refused each year, the impact of this right could be quite significant. It remains to be seen, however, how this provision will be interpreted. If the courts limit themselves to checking only whether proper procedures are followed then the impact of this right of appeal would be limited.

Another fundamental change looming on the horizon is the possibility of creating common visa issuance centres (as opposed to mere common centres for preparing applications for visas). The common visa policy (=list) was considered necessary, originally as a flanking measure because of the lack of trust among Schengen Member

States. So far Member States have not been willing to exercise their sovereign right to issue a visa via their own consular officials although these officials have to apply European rules. Lack of trust could ultimately be a factor in favour of the last step of transferring the right to issue visas to a common body, for example a European Visa Service. Those Member States that do not trust the others to be strict in issuing Schengen visas might favour the creation of such an institution. This final step in the Europeanization of visa policy seems remote at this point, but given the progress achieved over the last decade it could materialize sooner rather than later.

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ANNEX 7.2 TO CHAPTER 7: EVOLUTION OF VISA POLICY REQUIREMENTS AS CRITERIA IN THE ACCESSION PROCESS

(Based on the opinion and regular reports from the Commission)

This annex shows the evolution of key passages taken from the relevant Commission reports. The earlier reports refer to the initial avis of the Commission on the membership application of each country (mostly done in 1997). The subsequent extracts are taken from the so called regular reports, which the Commission issued in principle each year, starting in 1998 and finishing in the year the accession treaty was signed. This annex reports for each country concerned just the key passage dealing with visa, but sometimes also passages from sections dealing with border controls and migration.

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1. BULGARIA

Year	Bulgaria
1997 avis	Since 1989 many Bulgarians have sought work in EU countries, notably Germany and Greece. Bulgaria is now becoming a transit country for third country migrants, from Asia and Africa as well as the NIS, seeking to cross to the EU. Because of concerns about emigration trends, abuses of the immigration system and other relevant factors such as drug trafficking through the Balkan route, the EU decided to include Bulgaria and Romania on the list of third countries for which visas are required. The Bulgarian authorities are now seeking to put in place measures which effectively tighten the visa regime. The admission system is also being strengthened, with rules on residence and work permits and naturalisation being tightened, especially for risk countries. In March 1997 the Bulgarian Government decided to introduce a visa free regime for citizens of EU/EEA countries. Bulgaria is also tightening up enforcement procedures, deportation procedures and penalties for illegal immigration and have put in place sanctions against carriers. Bulgaria has readmission agreements with Germany, Greece, France, Spain, Poland, Slovakia, Slovenia and Lithuania and is preparing agreements with Portugal, the Benelux countries, Denmark, the Czech Republic and Romania. It does not have such an agreement with Turkey. The Bulgarian border management system is currently being reformed, introducing common information systems, document control and improved surveillance. Responsibility is split between the military (Turkish border, reflecting arrangements during the Warsaw Pact period) and the border guard, but plans are now being implemented to create a single, civilian national border guard. Current and Prospective Assessment Bulgaria has begun to take the steps in all key areas of JHA to work towards EU requirements. In the legislative field most (but not all) key measures are either in place or in preparation. The difficulties Bulgaria is facing over its relations in the visa field with the EU are leading to considerable efforts on the part of the Government to strengthen the visa and admission systems to bring them more into line with EU systems, but there is still some way to go to achieve alignment with the acquis.
1998	A comprehensive strategy to fight illegal immigration was adopted in 1997 and a number of specific measures have been put in place, such as the law to prevent the establishment of “phantom factories”, a law on the situation of aliens (passed on first reading) and legislation on Bulgarian identity papers that is in conformity with European standards. This legislation on identity papers has been put into effect and supplemented by measures to detect false papers. The system for issuing visas has improved markedly, thanks largely to the creation of a central data bank that can be accessed by all consulates. Further readmission agreements have been concluded. The Bulgarian border control system is in the process of reform and the border service is being demilitarised. Most border posts have an electronic link to Sofia

	to help prevent the entry of undesirable aliens. Despite these efforts, the infrastructure at the border posts still needs improving, particularly at Sofia airport. It is essential that Bulgaria carry out all these reforms in order to be able to meet Bulgaria's request to be taken off the common list. Conclusions Bulgaria has made laudable progress in meeting the short-term priorities for the Accession Partnership (combating organized crime and border management) but more unremitting effort will be needed to comply with the acquis. Looking ahead, these efforts will have to be supplemented by determined action on two fronts to achieve medium-term objectives,: - legislation on asylum and foreign nationals with have to be brought up to EU standards to complete the work done to install efficient controls at the borders, one of which will be an external border; - resolute action on staffing to ensure sufficient numbers and a sufficient level of training to implement the new legislation properly.
1999	As regards immigration, following the adoption in 1997 of a strategy to combat illegal immigration, in December 1998 Bulgaria adopted and made enter into force a new law on foreigners which regulates the conditions of entry, stay and control of foreigners. Within this framework, it is still necessary to clarify the conditions applicable to family reunification. Another law which entered into force in April 1999 foresees the replacement, between now and March 2001, of Bulgarian identity documents by documents which cannot be forged. Means of detecting of forged documents are being installed gradually at the various border control points, as is the case with Sofia airport. On 1 September 1999, Bulgaria introduced a visa requirement for nationals of Bosnia- Herzegovina and of Cuba and decided to extend this measure, from 1 November 1999, to the following states: Armenia, Azerbaijan, Kazakstan, Khirgistan, Uzbekistan, Tajikistan and Turkmenistan. But nationals of Belarus and of Moldova are still not required to possess a visa. Bulgaria should continue progressive alignment of visa legislation and practice with that of the EU. Readmission agreements were signed with the Benelux countries (7/10/98), Hungary (11/11/98) and Norway (16/12/98). Therefore Bulgaria now has readmission agreements with 13 Member States of the Union as well as with Hungary, Norway, the Czech Republic, Poland, Slovakia, Slovenia and Switzerland. Such agreements remain to be concluded with the United Kingdom and Ireland. Bulgaria must now concentrate on reinforcing its administrative capacities in order to be in a position to apply effectively legislation on immigration. Conclusion Bulgaria made some significant progress in the field of justice and home affairs, through in particular reinforcement of the legislative framework in the majority of sectors. The clearest advances can be noted in the fields of immigration and justice.

2000	As far as visa policy is concerned, Bulgaria has continued to make progress. It has rescinded agreements on visa-free regimes with Belarus, Moldova, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan with effect from January 2000. A readmission agreement was signed with Romania in June 2000. Negotiations on readmission agreements with the UK and Ireland have started. The administrative, organisational and legal measures taken by Bulgaria in the past years to counter illegal migration have been further consolidated since the last Report. The special software programme developed for visa issuing and passport control is now operational in 59 Bulgarian diplomatic and consular missions, providing an online link to the Visa Centre at the Ministry of Foreign Affairs. Bulgaria has amended the Bulgarian Identity Documents Act to accelerate the issuing of new documents, bringing forward from end March 2001 to end December 2000 the date by which documents must be replaced with new ones that cannot be forged. Some progress has been made towards meeting the short-term Accession Partnership priority of implementing effective border management control systems. Through amendments to the Ministry of the Interior Act in April 2000, a new definition of border control was adopted, of "guarding and controlling" instead of "guarding and protecting" state borders. Demilitarisation of the border police is ongoing and since 1999, progress has been made as planned with the programme to reduce the number of conscripts by 2,000 and the procedure has been launched to replace them with 1,300 professional police officers. To compensate for the reduction of personnel, the Border Police is in a process of modernising its equipment, giving priority to the border with Turkey and the Black Sea maritime border. Progress has also been made to improve border control facilities at Sofia International Airport to prepare for compliance with Schengen requirements, and new equipment for passport control has been installed at 10 major border crossing points. Statistics from the Border Police show that the attempts to illegally cross the borders have increased from 18,329 attempts in 1998 to 22,733 in 1999. Citizens from Romania (2,933), Turkey (2,561) and Moldova (912) lead the list of attempts at illegal border crossing. Overall assessment Bulgaria has already largely aligned its visa regime but maintains visa-free regimes with Ukraine, FYROM, Russia, Georgia, Yugoslavia and Tunisia. Readmission agreements have now been signed with all the EU member states except the UK and Ireland, where negotiations are currently underway.
2001	Significant efforts over the past few years have brought Bulgaria's visa policy largely into line with the policy of the EU. As a result, since 10 April 2001 Bulgaria has enjoyed a visa-free regime with all Schengen member states. From October 2001, Bulgaria introduced visa obligation for citizens from Russia, Ukraine and Georgia. At the end of 2000, a new Training Centre for Consular officers was established. The equipment of the Visa Centre in the Ministry of Foreign Affairs is being updated with the introduction of a new visa control computer system. Bulgaria has introduced a visa classification that is in line with the Schengen classification. The provisions of the Bulgarian Identity Documents Act and the Regulation on the Terms and Conditions for Issuing Visas by the Diplomatic and Consular Missions of the Republic of Bulgaria are in line with the requirements for a uniform visa format.

	Border police officials have access to the database on all visas issued by the visa centre, thereby reducing the possibilities for misuse or falsification. The Automated Fingerprint Identification System (AFIS) has been operational since October 2000 at the main border check points. The process of replacing the identity documents of Bulgarian citizens and long-term residents, which started in 2000, continued and is due to be completed by the end of 2001. The new Bulgarian passports and identity documents are considered to be of very high quality from the point of view of document security. Overall assessment Bulgaria has already largely aligned its visa policy with that of the European Union. It maintains visa-free regimes with FYROM, Romania, Tunisia, and Yugoslavia. Despite recent efforts, the capacity of the visa centre will need to be strengthened to deal efficiently with the large increase in the number of requests for visas.
2002	With the amendments to the Foreign Nationals Act in April 2002 and the adoption of a new regulation on the terms and conditions for issuing visas, Bulgaria made further progress in aligning its visa policy with the policy of the EU. A new version of the visa control computer system has been installed in 30 consular offices. The capacity of the visa centre has been further strengthened by means of additional staff and technical equipment. An action plan for the adoption of Schengen requirements was approved in November 2001. It defines measures and deadlines in order to achieve compliance with the Schengen acquis. Some progress can be reported in the area of external border control. Overall assessment Despite further efforts, Bulgaria's visa policy is not fully aligned with the EU visa obligations list with regard to nationals of the Federal Republic of Yugoslavia, FYROM and Tunisia. Moreover, it is not yet fully aligned with the EU visa-free travel list. For 22 South and Latin American states, there is still no visa free regime. Although the security features of the new Bulgarian visa sticker meet very high standards, the on-line processing system does not yet extend to all visa-issuing offices. Efforts to equip all diplomatic and consular missions with devices to detect forged or falsified documents should be strengthened, with special priority given to high-risk countries. In order to better combat illegal migration, Bulgaria should limit the number of countries whose holders of diplomatic and service passports are exempted from the visa obligation. Finally, Bulgaria still needs to align its legislation on seamen in transit with the EU acquis.

	Negotiations on this chapter are continuing. Bulgaria has not requested any transitional arrangements in this field.
2003	In the area of visa policy, the technical equipment, necessary for issuing the new sticker is in the process of being installed in all diplomatic and consular representations. Priority has been given to missions in Europe and high-risk migration countries. The administrative capacity of the Visa Centre of the Bulgarian Ministry of Foreign Affairs has been further increased with the recruitment of 21 officers. The Visa Centre is also connected with the computer network of the Bulgarian border check points which enables automatic transfer of all the data into the Border Police database, as well as with the office of the alien's control authorities. At present 66 diplomatic and consular missions are connected to the Visa Centre. The remaining 27 diplomatic missions are in a process of being connected. Training of consular staff is continuing and is assured by a special Training Centre for consular personnel within the Visa Centre. Overall assessment As regards visa policy, alignment to the so-called negative list was almost completed already in 2002. Visas for nationals from Serbia and Montenegro, FYROM will be introduced upon accession and for Tunisia in December 2003. As regards the so-called EU positive visa list, Bulgaria still has to align its visa policy for 20 countries, most of them being Latin American countries. The administrative capacity of the visa centre has been further enhanced. Bulgaria is in a process of providing the necessary equipment to its diplomatic and consular missions. For the time being 30% of the Bulgarian diplomatic and consular missions are equipped with basic equipment to detect forged or falsified documents, mainly in the high-risk migration countries. Training of consular staff has considerably improved. Negotiations on this chapter have been provisionally closed. Bulgaria has not requested any transitional arrangements in this field.
2004	As regards visa policy, Bulgaria terminated the visa-free regime with Tunisia in January 2004. Installation of the technical equipment necessary for issuing the new visa sticker continued throughout the reporting period. To date the system has been installed and functions in 87 diplomatic and consular missions. Alignment with the so-called positive list continued throughout the reporting period with agreements for lifting the visa requirements with Switzerland and Malaysia and agreements extending the period of visa-free stays with Estonia and the Czech Republic. Further negotiations were held on draft agreements providing for visa-free regimes with the other 15 countries and special administrative regions on the positive list - Argentina, Bolivia, Brunei, Costa Rica, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Salvador, Singapore, Uruguay, Venezuela, SAR Hong Kong and SAR Macao. In March 2004, Bulgaria updated its Schengen Action Plan to cover the year 2004 and presented a report on its implementation covering the period March 2003–March 2004.

	Overall assessment On visa policy, Bulgaria has not yet achieved full alignment with the EU visa acquis. Bulgaria still has to terminate the visa-free agreements with Serbia and Montenegro and FYROM. The administrative capacity of the visa centre has been further enhanced and Bulgaria is in the process of extending to all embassies and consulates the on-line system capable of securing direct contact between visa-issuing authorities and the central authorities. The full range of equipment necessary to detect forged and falsified documents have not yet been provided to all diplomatic and consular missions and considerable efforts are still needed in this area. As regards the so-called EU positive visa list, Bulgaria still has to align its visa policy for 15 countries, most of them Latin American countries.
2005	On visa policy, Bulgaria has to a large extent aligned with the provision and administrative structures needed to ensure effective implementation of the acquis upon accession. An Instruction for issuing visas to seamen was adopted in June 2005 as well as an Instruction for issuing visas at the border checkpoints in July 2005. Bulgaria still has to make provision for introducing a visa regime for the former Yugoslav Republic of Macedonia and Serbia and Montenegro, but is committed to do so upon accession. Bulgaria also made progress in further aligning its policy as regards the "positive" visa list. An agreement for a visa free regime with Uruguay was signed in January 2005 and entered into force in May 2005. Visa free agreements with SAR Hong Kong and SAR Macao were signed in April 2005. Preparatory measures to revoke the visa obligation for the other countries have continued. Bulgaria needs to start preparing for the implementation of VIS (Visa Information System) in view of lifting the internal borders upon accession to Schengen. As regards implementation and administrative capacity, Bulgaria now has 88 diplomatic and consular missions connected with its headquarters. Bulgaria is experiencing serious delays in installing of equipment to detect forged and falsified documents in diplomatic and consular posts and at the moment 50% of its missions have the required are equipment. Conclusion Bulgaria is generally meeting the commitments and requirements arising from the accession negotiations in the areas of migration, the fight against terrorism, customs co-operation, and human rights legal instruments and is expected to be in a position to implement this acquis from accession. Increased efforts are needed if Bulgaria is to meet the requirements for membership in relation to visa policy, asylum, judicial co-operation in civil and criminal matters, money laundering and the fight against drugs. In order to complete preparations for membership, Bulgaria must improve and accelerate implementation in these areas. Action to implement EURODAC is required as a matter of priority if Bulgaria is to be ready before accession. Increased efforts are also needed to fully align the Data Protection Act and to ensure the effective functioning of the Commission on Personal Data Protection. As regards the protection of personal data (see also chapter 3 – Freedom to Provide Services), increased efforts are now required to properly implement the legislation; the Commission for the protection of personal data should establish a sound administrative practice and effectively perform its core tasks, in order to ensure that Bulgaria will be ready to implement the acquis in this area at the time of accession.

2006	On visa policy, alignment with the EU positive list has continued by concluding bilateral agreements with Brazil and Venezuela. Bulgaria now participates in all VIS-related working groups and technical meetings and this should help to ensure that its national visa system is correctly aligned with VIS requirements. Bulgaria is committed to introducing a visa regime for the former Yugoslav Republic of Macedonia and Serbia & Montenegro before accession. Alignment with the EU positive list is yet incomplete. All Bulgarian consular posts have magnifying glasses, UV lamps and three metro-viewers. Furthermore, the missions have been equipped with specialised software to control documents. Overall, preparations in the area of visa policy are well on track. Conclusion Significant progress has been made in the area of visa policy and Bulgaria now generally meets the commitments and requirements arising from accession negotiations in this area.

2. CYPRUS

Year	Cyprus
1993 avis	14. Cooperation in the fields of Justice and Home Affairs 1. The Cyprus government has undertaken to meet all obligations and responsibilities deriving from the Treaty on European Union. This implies acceptance by the Cypriot authorities of all decisions concerning cooperation in the fields of justice and home affairs as set out in Title VI of the Treaty on European Union. 2. The involvement of Cyprus in the obligations resulting from Title VI of the Treaty could entail a major effort on the part of the authorities of the island in order to ensure that all the necessary means are employed so that full cooperation in the areas concerned becomes a reality. The extent of this effort can be established only by joint examination of the details of the relevant acquis.
1998	Immigration / Border controls Given its geographical situation and proximity to certain countries of origin (and transit) of illegal immigrants, the situation in Cyprus needs to be closely monitored. Illegal entry has been known, but has so far not reached levels of particular concern. In 1998, the law on foreigners and immigration was amended and tougher penalties introduced for those found guilty of assisting clandestine immigration, such as ship owners and ship's captains. Conclusion Cyprus has made progress in a number of areas, especially in combating money laundering, drugs trafficking and, more recently, illegal immigration. It must press ahead with its efforts. In other areas, Cyprus will have to adopt the international laws relating to civil and criminal procedures without delay and ensure that rules on asylum and immigration are applied to EU standards.
1999	Immigration / Border control The levels of economic development and social stability can favour organized flux of alliens wishing to reside in the country or as a transit point to the EU. Cyprus has a total of 772.49 kilometres of maritime borders. Nevertheless illegal immigration is not yet a major issue for Cyprus (estimation of 8000 illegal alliens) although some recent cases have been reported of smuggling of aliens especially via maritime routes. 4702 alliens were refused entry into Cyprus in 1998. In 1999 Cyprus has signed two interim readmission agreements with Lebanon and Syria. Further efforts are needed in the transposition of the acquis notably regarding, rules of admission, admission for employment, family reunification, marriages of convenience and expulsion measures. Uniform resident

	permits should be adopted and consular co-operation reinforced. The Cypriot Customs Service is committed to combating customs fraud, through a number of mutual assistance agreements with various partners. Co-operation has been established with the European Fraud Prevention Office (OLAF) in specific areas (e.g. the task force on cigarettes). Cyprus is a point for the international network engaged in smuggling cigarettes by sea. Cyprus should continue progressive alignment of visa legislation and practice with that of the EU. The Schengen visa system should be adopted. It would be convenient to establish links between the future legislation on asylum and the reform of the existing Aliens and Immigration Law in order to address cases of rejected asylum seekers who remain in the country. Current border control legislation appears to give the relevant authorities the powers needed to accomplish this task effectively. However additional measures must be taken (concerning in particular the inspection of documents under the terms of the Schengen Convention). Increased coastal surveillance may be necessary in order to decrease illegal immigration risks. Conclusion Since the 1998 Regular Report, some progress in the field of immigration, but none in the field of asylum has been noted. Concerning the fight against drugs, Cyprus has ratified the agreement on illegal traffic by sea transport, as suggested in the Regular Report. Six instruments in the field of judicial cooperation remain to be signed or ratified. During the coming year, Cyprus should therefore strengthen its visa delivery regime and adopt a forgery-proof visa, adopt new asylum legislation, ratify the Council of Europe convention on data protection and sign and/or ratify the international instruments for judicial cooperation.
2000	As regards visa policy, Cyprus has been gradually aligning its visa policy since October 1999. It has extended visa requirements to nationals of Commonwealth countries, and has published an order revising the visa free list of countries. Cyprus also harmonised in November 1999 its policy with regard to travel facilities for school pupils from third countries resident in a Member State. As far as migration is concerned, the Aliens and Immigration Law was enacted in March 2000. The problems faced by the office of the Migration Officer (charges of corruption and pending applications for visa, about 17 600) led the Council of Ministers to decide in November 1999 to restructure the Office of the Migration Officer, who is the main authority for migration policy, and to unify it with other Ministry Services by creating a Public Registry Department with three separate Divisions, i.e. the Aliens Division, the Citizenship and Passports Division and the Registration Division. In July 2000 an amendment to the “Aliens and Immigration Regulations” concerning family reunification was enacted. Cyprus has made further progress in aligning with the acquis relating to the organisation and the development of the CIREFI (Centre for Information, Discussion

	and Exchange on the crossing of frontiers and immigration) in May 2000. The contact point for the CIREFI information system is the Police Aliens and Immigration Department. In addition, the Aliens and Immigration (Carriers' liability) Law on combating illegal immigration was enacted in March 2000. Overall assessment As regards visa policy, Cyprus should continue the process of aligning its visa legislation and practice. It has several bilateral agreements for issuing visas at the border with Lebanon, Syria and Israel as well as bilateral merchant shipping agreements regarding seamen in transit, which are not aligned. Cyprus should also provide an on-line system for issuing visas. Cyprus is undertaking efforts to prepare for the issuing of a uniform visa as well as to participate in the Schengen Information System. As regards migration, due to its geographical situation, Cyprus is a target country and a potential transit area for illegal immigration. As the majority of illegal residents have entered legally, e.g. as visitors or under not-renewable work permits, the implementation of the legislation on combating illegal migration has to be strengthened. In 1999 1,966 non-nationals, who were not working, were arrested because they had overstayed their visa term. Also 396 non-nationals were found to be working illegally (without a proper visa). Implementation of the legislation on combating illegal employment as well as on expulsion also has to be strengthened. In addition, Cyprus should accelerate its efforts as regards adopting legislation in the field marriages of convenience.
2001	As regards visa policy Cyprus has gradually abolished the practice of issuing visas at the borders. In 2001, it has only been operating for nationals with whose countries Cyprus had has bilateral agreements to this effect (i.e. Bulgaria, Lebanon, Syria and Israel) or in exceptional cases for humanitarian reasons. Legislative harmonisation in the field of migration has intensified. An amendment to the „Aliens and Immigration Law" relating to marriages of convenience came into force in March 2001. Furthermore, the Council of Ministers adopted a large number of decisions in view of EU measures in the field. The decisions of December 2000 concerned unaccompanied minors from third countries, the exchange of information in the area of asylum and immigration, joint principles for the exchange of data in the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI), transit for the purpose of expulsion, checks on and expulsion of third country nationals residing or working without authorisation, means of combating illegal immigration and illegal employment, and clauses to be inserted in future agreements combining matters of EU and Member-State competence. In January and February 2001, the Council of Ministers also took decisions as regards forgery detection equipment at ports of entry, a specimen bilateral readmission agreement and the principles for the drafting of protocols on the implementation or readmission agreements. In June 2001, it issued a decision to align with the acquis as regards concerted action and co-operation in carrying out expulsion measures. Furthermore, in July 2001 Parliament enacted a regulation on the concept of family reunification. Overall assessment

	As regards visa policy, Cyprus has over the years achieved substantial alignment with the EU policy. However, eight countries on the EU list are still exempted from the visa requirement in Cyprus. The practice of issuing visas at the border is gradually being abolished. With regard to visas issued at the border for seamen in transit, the legal basis of this practice – the Merchant Shipping Agreements with six third countries – need to be renegotiated soon. Cyprus is continuing its efforts to prepare for the issuing of a uniform visa and its preparations to participate in the Schengen Information System. As far as migration is concerned, due to its geographical situation, Cyprus is a target country and a potential transit area for illegal immigration. As the majority of illegal residents have entered legally, e.g. as visitors or under non-renewable work permits, the implementation of the legislation on combating illegal migration should be further continued. The decisions of the Council of Ministers of December 2000 on checks on and expulsion of third country nationals residing or working without authorisation as well as the new legislation on marriages of convenience are steps in the right direction. The recent readmission agreement with Lebanon (a similar one is pending with Syria) foresees the repatriation of illegal immigrants to Lebanon if it is proven that their port of departure was in Lebanon. The implementation of this agreement should be scrutinised closely to ensure that it conforms to the principle of non-refoulement, bearing in mind that Lebanon (and Syria) has not ratified the Geneva Convention.
2002	As regards visa policy, further legislative alignment was achieved notably through introduction of the Airport Transit Visa, introduction of a visa obligation for nationals of seven countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Zimbabwe) in alignment with the EU visa obligations, abolition of the visa obligation for nationals of Bulgaria and Israel, and revocation of bilateral agreements with Bulgaria, Israel and Lebanon for the issuing of visas at the borders. With Syria, agreement was reached on the effective date for the revocation of a similar agreement, i.e. on 15 October 2002. Cyprus has started to upgrade a number of embassies and consulates in order to react effectively to the increased workload for the issuing of visas. By September, over 15 additional officers had been posted in Cyprus' embassies. In the field of migration, there was alignment with the acquis in December 2001 as regards admission of third country nationals for study purposes and for self-employment and in June 2002 as regards the adoption of practices followed by Member States concerning expulsion through amendments to the Aliens and Immigration Regulation. A readmission agreement was signed with Italy in June together with another agreement on co-operation in sea surveillance for combating illegal migration in the Eastern Mediterranean. In July, a readmission agreement was signed with Lebanon. Contacts

	have been established with Portugal, Romania, Egypt and Syria with a view to negotiating readmission agreements. Overall assessment As regards visa policy, Cyprus should continue the alignment of its legislation with the Common Consular Instructions. To complete the alignment with the EU visa obligations list, nationals of the Russian Federation and the Federal Republic of Yugoslavia must be removed from Cyprus.s visa-free travel list. A diplomatic mission should be established in Qatar or a temporary alternative solution should be found to facilitate the issuing of visas for nationals of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Cyprus has to terminate the practice of issuing visas at the borders for members of tourist groups. Cyprus must terminate, by accession at the latest, the practice of granting visas onboard the ships. As regards migration, Cyprus should devote close attention to the conclusion of the negotiation of readmission agreements with Member States and also with the countries of origin of illegal immigrants. It should strengthen and implement measures to combat illegal employment and implement relevant sanctions against employers who employ third country nationals without a work permit. Concerning the adoption of uniform residence permits and standard expulsion documents, it is noted that amendments to the Aliens and Migration Regulations are required to this effect.
2003	Cyprus has aligned its visa policy with the acquis except in the case of the Russian Federation, whose nationals are still exempted from the visa requirement, based on a bilateral agreement. On 30 September 2003, Cyprus gave notice of its decision to terminate the agreement and to introduce visas for Russian nationals as from 1 January 2004. As regards the issuing of visas at the borders, attention should be paid to the timely implementation of the acquis in this field in particular as regards Gulf States, Jordan, Ukraine, Belarus and Syria. Cyprus still needs to ensure alignment with the Common Consular Instructions, which will be done through a comprehensive new law on migration. As regards implementation and administrative capacity further efforts are needed in relation to infrastructure and recruitment of staff. Equipment to detect forged and falsified documents was installed in all diplomatic missions in April 2003. In the area of migration, Cyprus still needs to fully align with the acquis as regards in particular legislation on long-term residents. In this context, Cyprus should accelerate the adoption of amendments to the Aliens and Immigration Regulations. Cyprus is taking action to conclude readmission agreements, however further improvement is required, in particular with regard to neighbouring countries. Administrative structures are in place but a coherent training system for all migration services needs to be continued as regards in particular the fight against illegal employment. Conclusion Cyprus is partially meeting the commitments and requirements for membership in relation to the visa policy and in the area of asylum. Cyprus needs to adopt

	and implement the necessary legislation as regards the issuing visas at the borders and fully align with the visa Regulation as regards Russians citizens. Urgent action must be taken in order to ensure the proper implementation of the existing asylum legislation as well as the recently proposed measures as regards the enhancement of the administrative structures for which amendments to the existing legislation are required. Attention should also be given to the technical and organisational preparations necessary to implement EURODAC and Dublin II.

3. CZECH REPUBLIC

Year	Czech Republic
1997 avis	Since 1989 there has been a very large increase in the number of foreign nationals resident in the Czech Republic (now approximately 200,000). A current major priority for the Czech Government is to bring these migration flows under control. Residence and work permits are required for employment, but there are special rules for Slovaks given their close family and residence links with the Czech Republic. The Czech authorities are preparing new aliens legislation which will, among other things, stipulate that all visas must be issued abroad and also cover the registration of foreign nationals within the country. The Czech Republic is working to deal with expulsion of illegal immigrants in a structured manner, including seeking cooperation from IOM. Readmission agreements are in place with the Czech Republic's direct neighbours as well as Hungary, Romania, Canada and France. It is working to bring border management systems up to EU standards, but is hampered by the lack of technical equipment to check machine-readable documents and the fact that its internal communication system is not compatible with international norms.
1998	In its Opinion in July 1997 the Commission noted that drafts of most of the outstanding legislation were being prepared. The Czech Republic has not yet adopted either a new law on aliens or any concrete measures which would bring management of borders into line with EU rules. However, an interdepartmental committee has been set up under the Minister for Home Affairs to pave the way for adaptation of the acquis, and the ministry has drafted two "strategic" documents on measures to improve border management and control immigration. Conclusion There has been a marked slowing down in the rate of progress required to adjust to the EU acquis. The short-term priority of improved border control has not been achieved. The new government must now apply itself to carrying out its intentions and press ahead with reforms to meet the medium-term priorities of the Accession Partnership, specifically: - more efficient border controls and the adoption of new laws on asylum and migration, including adjustment of visa policy, to comply with EU standards.
1999	November 1998's Regular Report found that the Czech Republic's alignment process had slowed down appreciably. It highlighted the meagre progress on border controls, which figured among the Accession Partnerships' short-term priorities. The Regular Report called on the Czech Republic to step up the pace of reforms with a view to adopting new legislation on asylum and immigration, adjusting its visa policy, The Czech Parliament has still to adopt the draft Aliens Act approved by the government on 28 April. In August the government adopted a resolution on the country's visa policy, detailing the introduction of visas for nationals of Belarus, Russia, Kazakhstan,

	Kyrgyzstan, Moldova, Turkmenistan, Ukraine, Cuba as well as visa for diplomats from North Korea and China. The Ministry of Foreign Affairs has been instructed to make the necessary preparations for the introduction of visa by the end of November. It is not clear, however, when the visa will be introduced concretely. The Czech Republic should continue progressive alignment of visa legislation and practice with that of the EU. The procedure for issuing visas is now being modernised: a working party was set up for the purpose in September last year, and a pilot project, considered satisfactory by the Czech authorities, is now being extended to several of the Czech Republic's diplomatic missions. Conclusion Generally speaking, preparations for the adoption of the justice and home affairs acquis have speeded up, but this has yet to be reflected in the country's legislation (other than on drugs) or administrative structures.
2000	Since the 1999 Regular Report, significant progress has been made in the Czech Republic in the fields of data protection, visas and migration. As far as visa policy is concerned, the new Act on the Residence of Aliens entered into force in January 2000. It includes new provisions on the issuing, validity and types of visas, as well as on uniform format. Visas are no longer granted at borders, except in certain specified extraordinary circumstances. Airport transit visas have been required for 11 countries since May 2000. Visa-free agreements with Cuba, Russia, Belarus, Ukraine, Cambodia and North Korea, as well as with China for holders of certain passports, were terminated during 2000. Visa requirements were formally confirmed by the government in respect of Georgia and Tajikistan. In May, the Government also decided to introduce visas for citizens of Kazakhstan, Kyrgyzstan, Moldova and Turkmenistan. As regards administrative capacity, visa matters are overseen by the newly established Department for Immigration and Border Control in co-operation with the Alien and Border Police. An on-line system for issuing visas is currently operating in the Ministry of Foreign Affairs and in 59 diplomatic missions out of 107. The on-line connection between border crossing points and the central database of visa applicants is being tested. Overall assessment The Czech Republic has made significant progress in aligning its visa policy with the European Union, terminating existing visa-free regimes with a large number of countries, and preparing the imposition of visas with all countries necessary to ensure full alignment before accession. The new Aliens Act sets the basic legal framework to introduce measures aimed against the misuse of visas. The medium-term priority of the Accession Partnership regarding the alignment of visa policy has therefore been successfully addressed. In order to improve identity checks and detection of attempts to misuse visas it is still necessary to develop a Schengen-type visa sticker, introduce the electronicallysupported

	system for issuing visas to all its diplomatic missions, and connect the online query system at border crossings to a central database of visa applicants. Visa offices throughout the country will also gradually have to be equipped with a similar system.
2001	Since the 2000 Regular Report, further progress has been made in the Czech Republic in the fields of data protection, border control, visas. The Czech Republic has made good progress in aligning its visa policy with that of the EU, including as regards airport transit visas. . The amendment to the Act on the Residence of Aliens, which entered into force in July 2001, is a further step in the direction of full alignment with the acquis. It reduces by half (to 90 days) the time for issuing visas and removes some of the entry requirements like the health insurance certificate. As regards administrative capacity, visa matters are overseen by the Department for Asylum and Migration Policy in co-operation with the Alien and Border Police. An on-line system for issuing visas is currently operating between the Ministry of Foreign Affairs and 104 out of the 107 competent diplomatic missions and is connected also with the main border crossing points. The Czech Republic is making progress in aligning itself with the Schengen requirements and continues to prepare for future participation in the Schengen Information System. The Government established a very thorough Schengen Action Plan in this respect. All new passports are machine-readable, although no deadline has yet been set for withdrawing non machine-readable passports. Overall assessment The Czech Republic has further aligned its visa regime to ensure full alignment before accession, and the new amendment to the Aliens Act has also improved the conditions for granting visas. As regards administrative capacity, however, there is still a need to take full account of migratory risks and to improve identity checks and the detection of the misuse of visas. Not all official border crossings are yet connected to the on-line system for issuing visas. The Government has drawn up a high quality Schengen action plan. The successful implementation of this high-quality plan hinges on the above constraints being effectively addressed.
2002	The Czech Republic has continued to make good progress in aligning its visa policy with that of the EU. It aligned its visa obligations with the acquis in December 2001, and is currently preparing a standard visa-free agreement with certain countries, in line with EU visa-free travel. The Act on the Residence of Aliens, already amended in 2001, was further amended in May 2002. Thus, a new visa sticker for short-term and long-term stay was developed which corresponds to the EU visa sticker as far as possible and is being gradually introduced. The country has achieved considerable progress in modernising the visa issuing procedure: new general consulates have been opened in Poland and the Russian Federation and an on-line system is currently operating between all 108 Czech diplomatic missions issuing machine-readable visas (except Zimbabwe), the Ministry of Foreign Affairs and the Alien and Border Police Service. The upgraded visa software ensuring higher data transmission speed and improved data security is now installed at the diplomatic missions. So far, about 800 000 visas have been issued under the new visa system.

	Since November 2001, the Czech Republic continued to make important progress in the implementation of its Schengen Action Plan. Overall assessment The Czech Republic has almost completed the approximation of its visa regime. The outstanding task remains the alignment with the EU visa-free travel list. The new amendment of 2002 to the Act on the Residence of Aliens is indeed another positive development as regards the issuing of visa stickers with high security features. Regarding its administrative capacity, and despite the fact that the Czech Republic has continued to make notable progress, it is still necessary for regional and district authorities to pay attention to migration risks. Conclusion Negotiations on the chapter have been provisionally closed. The Czech Republic has not requested any transitional arrangements. The Czech Republic is generally meeting the commitments it has made in the accession negotiations in this field.
2003	Preparation in the Czech Republic with regard to the Schengen provisions (Schengen Action Plan) relevant for accession is broadly satisfactory, but further efforts are still required to conclude the remaining bilateral co-operation and re-admission agreements, as well as an agreement with Slovakia restricting border crossings to designated points, and to complete alignment of the border regime in respect of the border with Slovakia. The Czech Republic should continue its preparations for the lifting of internal borders and full implementation of the Schengen acquis on the basis of a further decision to be taken by the Council. The preparation for integration into the Schengen Information System (SIS) II is progressing according to schedule. On visa policy, the Czech Republic has almost completed approximation of its visa regime, but still needs to align as regards EU visa-free travel and to introduce a Schengen-type visa sticker following the transmission of the relevant technical specifications by the EU in August 2003. Administrative structures are in place and are functioning adequately. Conclusion The Czech Republic is essentially meeting the requirements arising from the accession negotiations and is expected to be able to implement by accession the acquis in the areas of the Schengen Action Plan, data protection, visa policy.

4. ESTONIA

Year	Estonia
1997 avis	Estonia has visa free arrangements with the UK, Denmark, Finland, Sweden, Norway, Iceland and several central European countries, including Latvia and Lithuania with which it operates a common visa space. Further visa-free regimes are negotiated with other EU member states. Estonia has adopted the EU third country list for which visas are required. Estonia has introduced machine-readable passports.
1998	Concerning visa policy, new visa rules (which are compatible with the EU *acquis*) have been adopted. Some types of visa (such as exit and resettlement visas) have been abolished, and new types (such as tourist and business visas) have been introduced. Furthermore, the rules governing the extension of visas and the maximum length of stay in Estonia have been clarified. A new visa sticker which is suitable for optical readers and is in line with EU standards has been introduced. Estonia has an agreement with Russia that allows persons living in the Narva–Ivangograd area to enter Estonia with an special permit instead of a visa. This practice is not in line with EU rules. Estonia has concluded readmission agreements with a number of countries, the latest being with Switzerland (January 1998). Amendments to the *Aliens Act* have been introduced to grant permanent resident permits to non-citizens under certain conditions (see political criteria). With regard to border controls, substantial progress has been made in negotiating a border agreement with Russia. Most of the technical issues have been resolved, and Estonia has signalled its readiness to sign the agreement when Russia is ready.
1999	In the field of *immigration*, Estonia lies off the international migration routes and is not for the time being a major country of destination or transit. In 1998, 450 foreigners were detained while attempting to cross the border illegally. Estonia's visa policy is aligned with that of the EU, except for the facilitated border crossing formalities for Russian nationals living in border areas (Narva-Ivangorod).

	Estonia should continue progressive alignment of visa legislation and practice with that of the EU. **Conclusion** The facilitated border crossing procedures need to be brought into conformity with EU-visa practice.
2000	As far as **visa policy** is concerned, progress has been made in order to align it further. Since September 2000, Estonia has abolished visa-free border crossing for Russian nationals living in border areas. In addition, amendments to the Aliens Act were adopted in December 2000, regulating the issuing of visas at border checkpoints. Visas are no longer granted at borders except in extraordinary circumstances specified in the law. In August 2000, a regulation providing the legal basis for the establishment of the National Visa Register was adopted. Furthermore, requirements for airport transit as well as the list of data to be kept in the National Visa Register have been established. *Overall assessment* With the abolition of the special visa regime for Russian nationals living in border areas, progress has been made in further aligning Estonia's **visa policy**. Estonia should continue alignment of its visa practice, such as developing the Schengen-type visa sticker and generalising the electronically supported system for issuing visas to all diplomatic missions.
2001	As far as **visa policy** is concerned, Estonia has been making substantive progress in terms of visa alignment, terminating existing visa-free regimes with a large number of countries, and preparing the imposition of visas with a number of countries as required by the *acquis*. The Agreement between Estonia and Croatia on abolition of visa requirements entered into force in September 2000. Agreements on the Abolition of Visa Requirements were also concluded with Chile, Costa Rica, Hong-Kong, Macao and Israel. Progress has been registered in alignment with, and implementation of, the *acquis* in the field of control of **external borders**, and as regards preparations for the **Schengen** *acquis*. The Schengen Action Plan was approved by the Government in July 2001. Although the implementation of the Border Agreement with Russia is dependent upon ratification by Russian Parliament, in practice it is reportedly applied on the ground. As regards **migration**, legislation is in place for visa policy and fight against illegal immigration. In January 2001, the Parliament adopted amendments to the Aliens Act, Refugees Act, the Obligation to Leave and Prohibition on Entry and the Identity Documents Act. *Overall assessment* Estonia has made significant progress in aligning its **visa policy** with the *acquis* but Estonia still needs to prepare for the application upon accession of the regulation on the uniform format for visa, in particular to improve identity checks and detection of attempts to misuse visas, and the regulation on the common

	visa lists. Alignment with the administrative provisions of the Common Consular Instructions that need to be applied upon accession is also required. In the framework of the establishment of a Visa Register, which was introduced on a trial basis within the Citizenship and Migration Board at the beginning of September, Estonia needs to introduce the electronically-supported system for issuing visas in all its diplomatic missions, and connect the query system at border crossings to a central database of visa applicants. Visa offices throughout the country will also gradually have to be equipped with a similar system.
2002	Since the 2001 Regular Report, further progress has been made in Estonia in the fields of data protection, border control, visas, migration, police co-operation and judicial cooperation. Estonia has made good progress in aligning its **visa policy** with that of the EU, includingairport transit visas. In terms of administrative capacity, Estonia has set up an onlinenational Visa Register. The Estonian Citizenship and Migration Board implemented theVisa Register in August 2001. In September 2001, the Visa Register was introduced atborder checkpoints. Since November 2001 all visas in Estonian foreign representationsare processed through the Visa Register. The online national Visa Register became fullyoperational in February 2002, and it will be able to function as part of the NationalInformation System (N-SIS) containing Schengen-compatible data.Estonia is making progress in aligning itself with the **Schengen** / EU requirements andcontinuing to prepare for future participation in the Schengen Information System (SIS II) in line with its Schengen Action Plan of July 2001. Estonia started to introduce new ID cards in January 2002, also for non-Estonian citizens.The ID card is an internal identification document and a device enabling the holder togive digital signatures. ID cards of resident aliens, in addition, contain data of residenceand work permits. The new passports, introduced in February 2002, are machine-readable and are compliant with EU requirements in terms of increased security levels. *Overall assessment* As regards **visa policy**, Estonia has made progress through the introduction of the new visa register. Estonia still needs to adopt the necessary provisions and ensureadministrative capacity in order to guarantee effective implementation of the new visa regulation upon accession. In particular, it should complete the alignment with the lists of countries whose nationals are exempt from visa obligation when crossing the external borders of Member States, namely through the conclusion of visa-freeagreements. Estonia should continue its efforts to align with the rules of the Common Consular Instructions and ensure proper functioning of the visa-issuing procedures, administrative management and organisation. All diplomatic and consular services should be provided with equipment to detect forged or falsified documents.

	The negotiations on this chapter have been provisionally closed.
2003 Comprehensive monitoring report	On **visa policy**, Estonia has almost completed alignment with the EU visa *acquis*. Estonia has introduced visas requirements for all countries with EU visa obligations and has to implement and complete bilateral visa free travel arrangements with 17 outstanding countries. Estonia should also introduce a visa sticker following the transmission of the relevant technical specifications by the EU in August 2003. As regards implementation and administrative capacity, the national visa register is operational, with connections with the Estonian foreign representations for processing visa requests. The capacity of the consulates in the Russian Federation, Belarus and Ukraine need to be reinforced. Estonia also has to provide all diplomatic and consular missions with equipment to detect forged and falsified documents. Estonia is essentially meeting the commitments and requirements arising from the accession negotiations and is expected to be able to implement by accession the *acquis* in the areas of **Schengen Action Plan, visa policy.**

5. HUNGARY

Year	Hungary
1997 avis	Some 40 million border crossings were made in 1995; of these some 103,000 were illegal. Migrants are coming from Romania, former Yugoslavia and the NIS, aiming to transit Hungary to the west (although Hungary is also becoming a target country). Hungary has visa-free agreements with EU countries and the NIS (for the latter invitation letters are required); Hungary is considering its position on the visa-free agreements with the NIS in the light of the requirement to harmonise with the EU list of third countries for which visas are required. Hungary is also modernising its consular visa issuing procedures, which already stipulate that visas must be issued abroad. A comprehensive review of aliens legislation is under way in the light of EU requirements. Currently some 2,000 immigration permits a year are issued to ethnic Hungarians. Those unable to justify their status within the country can be subject to measures ranging from restrictions on movement to detention and deportation - these measures can be challenged before a court of law. Readmission agreements are in place with Austria and neighbouring countries; such agreements are in preparation with France, Germany, Belgium, NL and Greece and with Russia, Turkey, India, Pakistan, China and Vietnam. Border management is currently being modernised at the Austrian border and the Government plans (in part with PHARE assistance if made available) to upgrade information systems at the borders, introduce passport readable machines and to upgrade all remaining border points. The Government has submitted to parliament a draft law on border management and the organisation of the border guard. **Current and Prospective Assessment** The visa systems with regard to the NIS and other non-associated neighbours remain unsatisfactory and Hungary will need to ensure that the facilitation of crossing by ethnic Hungarians from neighbouring countries does not detract in any significant way from the need to carry out effective border controls at the future external border.
1998	In its 1997 Opinion, the Commission stressed as a priority the need for efficient border controls including a visa regime increasingly close to that of the EU and an asylum policy without geographical reservations and with sufficient resources. **Conclusion** Hungary has confirmed its ability to make progress in taking on the Community *acquis* by focusing on the two major deficiencies identified in the short-term priorities of the Accession Partnership: asylum legislation with no geographical limits and a better system of managing border controls. Considerable progress

	has been made in these areas. In the interests of meeting the medium-term objectives, the existing efforts should be expanded to include: - a law on foreign nationals and a visa policy suited to the requirements of the EU (and covering the Commonwealth of Independent States) ;
1999	The Commission underlined in the 1998 Regular Report, the necessity of adopting a new law on foreigners and a visa policy suited to the requirements of the EU. In the area of visa policy, Hungary has prepared a programme to harmonise Hungarian visa requirements with the *acquis*. The visa obligation for airport transit for nationals of certain countries, introduced in September 1998 in accordance with the relevant EU Joint Action on airport transit arrangements, has not yet been implemented. Hungary should continue progressive alignment of visa legislation and practice with that of the EU.
2000	Since the 1999 Regular Report, progress was registered in Hungary in the fields of visas, border management, migration and asylum. However, little progress is to be reported in the field of judicial co-operation. In the area of **visas,** the Hungarian legislation was further aligned with the *acquis* by introducing a free travel regime for citizens of New Zealand and Venezuela. A new agreement with Brazil was signed. In August 1999, the obligation to have airport transit visas was introduced for citizens of a number of countries. In June 2000, an Interim Compulsory Visa Agreement between Hungary and Russia entered into force for all kinds of income-generating activities, for the purpose of pursuing studies and for a stay exceeding 30 days. For all other activities, Russian citizens can enter Hungary without visa, provided that they have an invitation letter or sufficient financial coverage. Hungary also concluded Compulsory Visa Agreements with Azerbaijan, Tadjikistan, Armenia and Turkmenistan. A new visa issuing system was created by the Ministry of Foreign Affairs with an on-line information system supporting consular work. Simultaneously, training of professional staff using the new system has started, and equipment for the recognition of counterfeit or falsified documents was purchased. *Overall assessment* The basic provisions of the *acquis* in the field of Justice and Home Affairs are already implemented. Additional efforts are needed to align with the **visa** *acquis*, in particular as concerns the visa exemption for citizens of Belarus, Cuba, FRY, Moldova, Russia and Ukraine. The agreements on simplified formalities for border crossing signed with Ukraine and FRY will also need to be amended as they exempt citizens living permanently near the border from the obligation to carry passports. The regulation on a uniform visa format and the rules of the Common Consular Instructions also need to be further aligned. There is a need to strengthen the Consular System and Hungary's capacity to detect falsified documents.

2001	Since the last Regular Report, progress has been registered in Hungary in numerous fields such as visa policy, migration, asylum, the fight against organized crime, corruption, drugs and judicial co-operation. As to **visa policy** new visa obligations have been introduced for Belarus, Bosnia-Herzegovina, Moldova, FYROM and Russia. Concerning the uniform visa format, the new Law on Entry and Stay of Foreigners adopted in May 2001 provided for new visa stickers further aligning with the *acquis.* The law that will be introduced in January 2002 also provides for the exchange of personal data between the co-operating aliens policing authorities and ensures alignment with the requirements of the Common Consular Instructions. These provisions will, however, only be applicable upon accession. The Hungarian on-line system to support the visa procedure has been extended offering access to 59 diplomatic and consular. 77 out of 91 consular missions received equipment for the detection of forged documents, with devices corresponding to standards set by the *acquis* for low risk countries, while 10 missions have been supplied with devices supplemented by infra-red cameras and monitors. Hungary has initiated local consular co-operation in certain third countries with their visa partners (France and Portugal) and instructed all its missions to participate in EU consular cooperation wherever possible. Staff of the office of immigration and naturalisation has been further increased. Furthermore, the Hungarian Government drew up a **Schengen** Action Plan in March 2001, which addresses the main issues of the *acquis.* Negotiations for bilateral agreements on border traffic control with neighbouring countries are under way. *Overall assessment* Overall, Hungary has reached a high level of alignment with the *acquis.* Continued efforts were made to align the Hungarian **visa** regime with that of the EU. However, further efforts are still needed to align with the *acquis,* in particular as regards visa obligations and visa-free travel. As regards Hungary's agreements on simplified border crossing with its neighbours, this kind of agreement is not in harmony with the *acquis.* Hungary will need to take the necessary steps to remedy this situation. Practical co-operation between the Hungarian Border Guards and their Romanian, Ukrainian and Yugoslavian colleagues is increasingly hampered by a growing discrepancy with regard to technical and other resources.
2002	Since the last Regular Report, considerable progress has been registered in Hungary in numerous fields such as visa policy, the Schengen Action Plan and the fight against fraud and corruption. As to **visa policy,** new visa obligations were introduced for nationals of Cuba, the Seychelles and the Republic of South Africa. The visa requirement has been abolished for the special administrative regions of Macao (December 2001) and Hong Kong (February 2002). The new Act on the Entry and Stay of Foreigners,

	which entered into force in January 2002, provided the legislative framework for the introduction of a new visa sticker with higher security standards. These started to be issued as of September 2002. An electronic Consular Information System supporting the issuing of visas (recording and storing the visa applications, printing the issued visa stickers) has become operational at the Office of Immigration and Naturalisation. All consular missions are now connected to the Consular Information System. The establishment of the register on visas and visa applications is in progress. In July 2002, Hungary submitted a revised Schengen Action Plan. As far as **migration** is concerned, an amended Law on Entry and Stay of Foreigners entered into force in January 2002, which introduced the unified residence permit and simplified expulsion rules. Anyone wanting to stay longer than 90 days in the country can apply for a one-year extendible visa. Residence of unlimited duration will be granted after five years of stay in the country, instead of three as before, and people with at least eight years of immigrant status can apply for citizenship. This means that foreign nationals will be able to initiate naturalisation procedures 13 years after arriving in the country. *Overall assessment* In the area of **visa policy**, legislation should be further aligned as regards EU visa obligations and EU visa-free travel. The number of staff of the Aliens Policing Division of the Office for Immigration and Nationality has to be increased in order to ensure that visa applications are dealt with expeditiously. All the provisions of the Law on Hungarians Living in Neighbouring Countries adopted in June 2001, including those concerning migration, will have to be applied in accordance with the *acquis* from the date of accession Negotiations on this chapter have been provisionally closed. Hungary has not requested any transitional arrangements in this area and is generally meeting the commitments it has made in the accession negotiations in this field. In order to complete its preparations for membership, Hungary.s efforts now need to focus on finalising alignment (data protection, visa policy), Bilateral relations remained equally constructive with most of its neighbours. However, some political tensions arose with Romania and Slovakia concerning the Law on Hungarians living in Neighbouring Countries (.status law.), which entered into force in January 2002. This law had been adopted in June 2001 without due consultation of Hungary.s neighbours. It was designed to foster the position of the Hungarian minorities abroad and granted them, on the basis of registration, in Hungary, certain rights and privileges in the areas of education and culture. Following the recommendations of the Council of Europe.s Commission for Democracy through Law (.Venice Commission.) on the roles and tasks of kin-states and home-states in minority protection, Hungary adopted in December 2001 and January 2002 legislation implementing the status law, which is broadly compatible with these recommendations. As agreed in a Memorandum of Understanding between Hungary and Romania, the law should have been revised in certain points in June 2002, but no progress can be reported in this respect. As regards Slovakia, an agreement on the application of the law is still pending. Hungary committed itself to repeal before accession any provision, which would not be compatible with EC law. As regards the .status law., the Commission will continue to monitor the situation and will request Hungary to bring the law at the latest upon accession . in line

	with the anti-discrimination provisions enshrined in the EC Treaty.
2003	So far, Hungary's preparations with regard to the Schengen provisions (**Schengen Action Plan**) relevant for accession are satisfactory, but further efforts will be needed after accession to prepare for the lifting of internal borders and the full implementation of the Schengen *acquis* on the basis of a further decision to be taken by the Council. The preparation for integration into the Schengen Information System (SIS) II is progressing well, in terms of the development of national applications. However, Hungary needs to monitor the situation closely. Hungary has made progress in the area of **visa policy** but has not yet achieved full alignment with the *acquis*, in particular as concerns the "positive" visa list. As regards implementation and administrative capacity, considerable progress has been made in relation to infrastructure, recruitment of staff, training and installation of information technology for the development of the consular network. All consular missions are connected to the Consular Information System. The centralised visa register has been established. Hungary is in the process of providing all diplomatic and consular missions with equipment to detect forged and falsified documents. The most important border crossing points are now equipped with the necessary materials according to Schengen standards. In addition, simplified border crossing agreements were concluded with Slovakia in 2002, and with Slovenia, Croatia, Serbia and Montenegro, Romania and Ukraine in 2003. *Conclusion* Hungary is essentially meeting the commitments and requirements arising from the accession negotiations and is expected to be able to implement by accession the *acquis* in the areas of the **Schengen Action Plan, data protection**, **visa policy.**

6. LATVIA

Year	Latvia
1997 avis	Latvia has visa free agreements with UK, Ireland, Denmark and Iceland. Such agreements are about to come into force with Norway, Sweden and Finland. Visa-free arrangements also exist with a number of Central European Countries. Operates a visa-free travel zone with Lithuania and Estonia. **Latvia has adopted the EU third-country list for which visas are required.**
1998	Since July 1997 bilateral agreements abolishing visas have entered into force with Andorra, Lichtenstein, Malta, Norway, Finland, Switzerland and Sweden. Similar agreement has been signed with Slovenia.
1999	New visa legislation adopted in April 1999 Since September 1998 bilateral visa-free regimes have entered into force between Latvia and Austria, France, Germany, Croatia, Italy, Slovenia, Spain, Germany and Portugal and have been signed with Belgium, the Netherlands and Luxembourg. Visas, basically in accordance with the EU standards are already being delivered and by the end of 1999 are expected to be machine readable. Latvia has no transit visa agreements or a system for Airport Transit Visas. The simplified local border crossing procedures with Russia and Belarus need to be brought into line with the EU visa requirements. It is possible to enter Latvia on a tourist visa and to get a work permit without leaving the country. Students have no right to work for limited periods and are not required to prove their social insurance cover when they arrive. Latvia should continue progressive alignment of visa legislation and practice with that of the EU.

2000	In January 2000 a unified visa information registration system which operates on-line with diplomatic consulates abroad was introduced. In May 2000 amendments were passed in the Law on issuing of visas providing for introduction of airport transit visas as from July 2000. Work on the implementation of the machine-readable visas continued. In March and in accordance with the requirements of the Schengen acquis, the Latvian government denounced the interim inter-governmental agreement on simplified local border crossing procedures between Russia and Latvia. The special permits have been replaced by charge-free visas for the local residents and these visas, unlike the special permits give access to the entire territory. The new regime will take effect six months after notifying the other party. Visas for Belarus were introduced in January 2000 A bilateral agreement on establishing a visa-free regime was signed with Japan (in force) and with Israel in January and May 2000 respectively. <u>Overall assessment.</u> Regarding visa policy Latvian legislation is broadly in line. Visa requirements have been introduced for all countries according to the acquis. Following the legislative amendments, the implementation of the airport transit visa regime now needs to be ensured. A proper transit zone at Riga airport, in order to cope with the expected larger flows of passengers carrying transit visas in the future, needs to be established. The on-line connection system for visa aplications between border crossing points and the central database should be completed as well as the issue of machine readable visas. Latvia will still have to develop a Schengen-type visa sticker and to generalize the electronically supported system for visa-issuing to all its diplomatic missions and to introduce the general obligation for personal application for visas.
2001	As far as visa policy is concerned, progress has been made in amending visa-issuing procedure regulations which specify the conditions for refusal of entry. In 2000, bilateral agreements on a visa-free regime were concluded with Israel, Japan and Cyprus.

	At present visa free regimes have been established with 32 states. The establishment of the transit zone at the airport was completed in August 2001. With a view to aligning with the acquis, Latvia has denounced the agreement with Russian on a simplified border crossing procedure for the inhabitants of the frontier area. Since October 2000, the special permits have been replaced by free of charge visas for local residents Since November 2000, border guards have been carrying out checks on transit trains throughout Latvia and in March 2001, a decision was adopted to denounce the agreement with Russia on transit train passengers crossing the territory of Latvia. As regards administrative capacity visa matters are managed by the Department of Citizenship and Migration affairs. Since January 2001, the Unified visa information system has been operating online with diplomatic consulates abroad, and machine-readable visas are currently issued at 29 diplomatic and consular representative offices. Visas cannot be issued at border crossing points with the exception of Riga airport where the DCMA can issue visas to citizens of the "white list" countries. (in 2000, 3% of the total number of visas issued were issued at the airport). An Action Plan on the implementation of the Schengen acquis was adopted in May 2001. **Assessment.** Latvia has continued to advance in aligning its visa policy, introducing a visa-free regime with several further countries and terminating existing visa-free regimes where required. Regarding the Unified Visa Information System (UVIS) some border crossings points still need to be connected with the online system. In order to improve identity checks and the detention of attempts to misuse visas, it is still necessary to prepare for the application, upon accession, of the regulation on the uniform format for visas and complete the connection of the query system at border crossings to a central database. Visa offices throughout the country will also gradually have to be equipped with a similar system. The capacity to detect falsified documents will have to be enhanced. The issuing of machine-readable visas needs to be completed, along with equipping of all divisions of the Department of Citizenship and Migration Affairs with printing machines.
2002	The regulation concerning visa issuing was amended, i.e. extending the uniform visa and limiting the issuing of new visas.

	Amendments in force wince May 2002 require transit visas for transit train passengers. Since the last regular report, agreements on a visa-free regime have been concluded with Monaco, Panama and Romania. At present, a mutual visa free regime has been established with 16 states, and with two states a visa free regime is applied unilaterally. As regards administrative capacity, the development of the Unified Visa Information System has continued and implementation of the Invitation Database and Entry Prohibition Database continued. Latvia is making progress in aligning itself with the Schengen/EU requirements and continues to prepare for future participation in the Schengen information system (SIS II). The government has established a very thorough Schengen Action Plan in this respect, which was revised in October 2001. In May 2002, the Law on Identity Cards and Passports, which defines the types, contents and usage of ID cards and passports, was adopted. The new passport system will include citizens and non citizens' passports, diplomatic and service passports, as well as stateless persons travel documents. All these documents will serve as travel documents and will be elaborated in accordance with the demands stipulated in the resolution of the International Civil Aviation Organization (ICAO) of 1999 and the Council Resolution of 17 October 2000 as regards passport contents, structure and security. **Assessment.** Latvia has continued to advance visa policy and its legislation is now broadly in line with the acquis. It is now essential o adopt all the necessary provisions and to put in place the necessary structures in advance of accession in order to ensure effective implementation upon accession of the new visa acquis. While Latvia has further expanded the visa free regime to several countries, this alignment needs to be completed. The adoption of the envisaged new Law on Immigration together with the implementing regulations and instruction will be essential to address the remaining shortcomings in this field. While progress was made regarding the uniform format for visas in line with the acquis, Latvia should continue its efforts to align with the rules of the Common Consular Instructions and to ensure proper functioning of the visa-issuing procedures, administrative management and organization. Enhanced cooperation between the different authorities dealing with visa issues should be promoted further. The development of the on-line Unified Visa Information System is on track. Its extension to all border checkpoints and diplomatic and consular institutions needs now to be ensured. Latvia should also continue efforts to sign a new agreement with the Russian Federation on mutual traveling of citizens and fostering of practical co-operation.
2003 Comprehen sive	The most developed part of this chapter is the Schengen acquis, which entails the lifting of the internal border controls. However, much of this acquis will not apply to the acceding countries upon accession, but only after a separate Council Decision. The Schengen Implementation Action Plan aims at preparing this on the basis of a credible schedule for the introduction of the Schengen provisions. Binding rules which must be put in place as from accession include part of the rules on visas, rules on external borders and the acquis on migration, asylum, police co-operation, customs co-operaion as well as human rights legal

monitoring report	instruments. On issues such as border control, illegal migration, drug trafficking and money laundering , organized crime, police and judicial cooperation, data protection and the mutual recognition of court judgments, acceding countries need to be equipped to meet adequate standards of administrative capacity. Preparation with regard to Schengen provisions (Schengen Action Plan) relevant to accession is still satisfactory, but efforts will be needed after accession to prepare for the lifting of internal borders and full implementation of the Schengen acquis on the basis of a further decision to be taken by the Council. The separation of traffic at air and sea ports should be subject to further monitoring. The preparation for integration into the Schengen Information System (SIS II) is still at a preliminary stage, in terms of development of national applications. Latvia has continued to advance on visa policy and its legislation is broadly in line with the EU visa acquis. Latvia has aligned with the acquis regarding countries with EU visa obligations. However, Latvia still has to align its policy with the acquis as regards EU visa free travel arrangements in relation to 18 countries. Regarding visa issuing procedures, Latvia is largely in line with the acquis, but some implementation legislation remains to be adopted. As regards implementation and administrative capacity, a national visa register has been established and the Unified Visa Info System, including databases for invitations and entry prohibitions, is operational on-line at all embassies, consulates, and border control points. Efforts are still needed to continue improvements in infrastructure, recruitment of staff and training. At all diplomatic and consular missions, the technical and human resources capacity to detect forged and farcified documents should continue to be strengthened. Latvia is essentially meeting the commitments and requirements arising from the accession negotiations and is expected to be able to implement by accession the acquis in the areas of Schengen action plan, visa policy and others.

7. LITHUANIA

Year	Lithuania
1997 avis	There is a growing problem of illegal migrants, mostly from Asia, aiming to transit Lithuania to the west. Organized gangs are involved in attempts to traffic illegal immigrants through Lithuania to Poland. In early 1997 some 600 such migrants and potential refugees were being held at the Registration Centre pending resolution of their status. Lithuania has visa-free agreements with the UK, Ireland, Denmark, Norway, Sweden, Finland, several central European countries, and third countries, as well as Estonia and Latvia, with which it operates a visa free space. It is adopting the EU third country list for which visas are required. Lithuania's citizenship and aliens legislation generally respects democratic norms. Lithuania has readmission agreements Estonia, Latvia, Denmark, Sweden, Finland, Switzerland, Norway and the Ukraine. Lithuania is seeking to conclude, but has not yet reached, readmission agreements with Belarus and Russia. Border management with Belarus and Russia is still inadequate, with the border not being effectively demarcated. The border guard suffers from institutional and human resource deficiencies and a shortage of surveillance equipment.
1998	On 13 February Lithuania signed a cooperation treaty with the international migration organisation under which it is developing a project to improve management of legal and illegal immigration. The mounting number of readmission agreements, the introduction of new identity cards and the adoption of an amendment to the penal code bringing in stiffer sanctions for trafficking in human beings should all help master migrant flows. Regarding border controls, Lithuania has fulfilled its obligations under the agreement on the demarcation of its eastern border. It is now up to Belarus to do the same. Lithuania is in the process of setting up a professional border guard service and equipping its border with electronic surveillance equipment. It is stepping up cooperation on border controls with the other two Baltic countries but controls are not yet up to EU standards. The lack of an automatic data-exchange network and lax controls at some crossing points are the main weaknesses.
1999	As far as *immigration* is concerned, Lithuania abolished visa requirements for all Schengen states in 1998 and this came into force fully following ratification by Belgium in June 1999. The visa stickers are properly protected and meet EU standards. The visa legislation is, therefore, generally in line with EU requirements. The derogation concerning the provisional agreements on visa free crossings to the border region in Belarus and the Russian citizens of the Kaliningrad region will be abolished in the future. Lithuania should continue progressive alignment of visa legislation and practice with that of the EU. . Provisions for Airport Transit Visas will be needed by the time of accession although in practice, few flights transit via Lithuania and transit passengers are escorted. A new Law on the Status of Foreigners entered into force in July 1999. This makes the alignment in the migration area almost complete, for example by introducing carrier sanctions. Rules on illegal employment are in conformity with EU requirements apart from a minor procedural adjustment concerning checks on unemployed residents. Lithuanian has signed six re-admission agreements. However, it has not been able to obtain any formal readmission agreement with Russia. The practical arrangements on readmission of persons who enter illegally from Russia are the same as those of Finland, Estonia and Latvia. As far as *border controls* are concerned, Lithuania has achieved substantial results with increased investments, training and professionalism of the border police. The number of illegal migrants passing through Lithuania is significantly lower than in previous years reflecting the effectiveness of the measures of detection and return operations

	established by the Lithuanian authorities. Lithuanian frontiers are well guarded. As regards the Lithuanian/Belarus border, Lithuania, which has completed the demarcation of its own part, is also actively contributing to the demarcation of the remaining part of the border which would normally fall under Belarussian responsibility. The Russian (Kaliningrad) border is marked throughout almost its entire length by a natural river boundary and is guarded by both sides. Formal demarcation is expected to follow the Russian ratification of the agreement signed in 1997.
2000	As regards **visa policy**, there are no developments of note to report since the last Regular Report. In the field of **border control**, the Law on the State Border of the Republic of Lithuania and its Control was adopted by the Lithuanian Parliament in May 2000, addressing the relevant short term 1999 Accession Partnership priority. This will facilitate preparations for police and border cooperation in view of Lithuania's implementation of the Schengen *acquis*. The Law's main provisions include general requirements for border crossing and a simplified procedure of border crossing according to different categories of individuals. The new Law also sets out requirements for control of Lithuanian territorial sea and air space, rules for crossing of the state border by Lithuanian and foreign troops, and the imposition of a ban on transportation of nuclear or other mass destruction weapons through the state border. In addition, the Lithuanian Government has adopted a substantial amount of secondary legislation, in view of further complying with the *acquis*. Regarding demarcation of the Lithuania/Russia (Kaliningrad) border, formal demarcation is expected to start following the ratification by the Duma of the Russian Federation of the border agreement that was signed in 1997. The Lithuanian Parliament ratified the border agreement in November 1999. *Overall assessment* Lithuanian **visa policy** is close to being in line with the Schengen requirements. Lithuania has approved a list of countries whose citizens require visas and there is also a "white list" of countries whose citizens do not require visas, in compliance with the Schengen *acquis*. Lithuanian visa insets are properly protected and are in line with EU standards on visa protection. However, Lithuanian policy in respect of simplification of the visa regime for border residents of Belarus and Kaliningrad is not in line with the common visa policy and will need to be revised before accession. Furthermore, in accordance with the Schengen Agreements, a fully functioning National Schengen Information System has to be developed and implemented in order to ensure a secure external border and movement of persons. National and international inter-institutional cooperation on the visa policy should also be strengthened. The current system for issuing visas is computerised with a central visa register being maintained by the Migration Department. The visa register is in use at Vilnius airport. The Border Police Department and all the diplomatic and consular missions have access to the database of undesirable persons.
2001	In the area of **visa policy**, there have been no legislative or administrative developments of note since last year's Regular Report. In October 2001, Lithuania presented its **Schengen** Action Plan with a view to the implementation of the acquis. *Overall assessment*

	Lithuania needs to fully align its **visa policy** with the *acquis* including as regards countries with which visa-free regime exists, visa sticker**,** and establishment of a central visa database. The Lithuanian visa regime in respect of third country citizens, including those from Belarus and Russia, will need to be brought into line with the *acquis* by the time of EU accession.
2002	Regarding **visa policy**, Lithuania signed during the reporting period visa-free agreements with the Republic of Korea, Hong Kong, Macao and Mexico (with the latter for diplomatic passports holders). In January the Regulations for the Issuance of Visas were amended and as a result the airport transit visas were effectively introduced in April 2002. In November Lithuania requested permission from the Russian Federation to open a consulate in Sovetsk (Kaliningrad) and from Belarus to open a general consulate in Grodno, but no reply has yet been received. Lithuania adopted in October 2001 its **Schengen** Action Plan, which was subsequently updated in July. Lithuania continued practical preparations for its participation in the Schengen Information System. The new Law on the Control of Weapons, which was adopted in January and is to enter into force in July 2003, largely ensures alignment with the weapons and ammunition control *acquis*. Lithuania completed in October 2001 the reorganisation of the Police Department at the Ministry of the Interior and established the Lithuanian Criminal Police Bureau. The Bureau includes the International Relations Service consisting of the Lithuanian National Interpol Bureau and is in future to include the SIRENE National Bureau. It has been decided that the International Relations Service will be responsible for police co-operation in accordance with Articles 39-46 of the Schengen Convention. Lithuania adopted in November the new Law on Passports. New passports will be in conformity with the security features of the *acquis* and the requirements set by the International Civil Aviation Organisation (ICAO) for machine-readable travel documents. New passports will be issued as from the end of 2002 at a rate of 400 000 per year. Old passports should be withdrawn from the circulation by the end of 2007. *Overall assessment* Lithuania has largely aligned its **visa policy** with the *acquis*. Efforts should focus on the full implementation of the new visa regulation, in particular regarding the list of countries whose nationals are exempt from visa obligations. Lithuania also needs to introduce a uniform format for visas in line with the *acquis* and further align with the Common Consular Instructions. It should also ensure the proper functioning of the visa issuing procedures, administrative management and organisation. The establishment of an online Visa Register as a constituent part of the Foreigner.s Register and the stepping up of the connection of all border checkpoints and diplomatic and consular institutions also need continued attention. The preparations for the introduction of transit visas for train passengers and lorry drivers crossing the territory of Lithuania to and from Kaliningrad as of 1 January 2003 are key developments. The Lithuanian decision on the general introduction of visa requirements for the residents of Kaliningrad as from 1 July 2003 should be implemented. Visas will also be introduced for nationals of Belarus and Ukraine as of 1 January 2003. Lithuania should continue its efforts to open and enlarge its consular facilities in Kaliningrad, in mainland Russia and in Belarus. It should however be

	noted that the success of these efforts depends, inter alia, on cooperation by the countries concerned. Negotiations on this chapter have been provisionally closed.
2003	On **visa policy** Lithuania is continuing to align its legislation with the *acquis*. Lithuania needs to align with the Common Consular Instructions and be in full conformity with the so-called "positive" visa listswhere negotiations are still ongoing with 13 countries. Lithuania should also ensure alignment regarding the uniform visa format following the transmission of the relevant technical specifications by the EU in August 2003. As regards implementation and administrative capacity, sustained efforts are needed in relation to infrastructure, recruitment of staff, training, the installation of information technology and the establishment of a national visa register. This visa register needs to be connected, in a secure manner, to all diplomatic and consular posts. Lithuania is essentially meeting the commitments and requirements arising from the accession negotiations in the area of Justice and Home Affairs and is expected to be in a position to implement from accession the acquis in the areas of the **Schengen Action Plan**, **data protection**, **visa policy**, **external borders**, the **fight against terrorism** and **drugs**, **customs co-operation**, **judicial co-operation in civil and criminal matters** and **human rights legal instruments**.

8. MALTA

Year	Malta
1999 avis update	Malta should continue progressive alignment of visa legislation and practice with that of the EU.
2000	No progress can yet be recorded on **data protection**, a short-term priority of the Accession Partnership, nor in the field of **visa policy**. Concerning **border control**, the passport system has been upgraded and now includes several new security features including digitised images and machine-readable passports. *Overall assessment* In the field of **visa policy**, at present there are no Direct Airside Transit Visas (DATV) as required in the *acquis* for people not leaving the airport terminal. However, there are transit visas for non-national passengers who will arrive and depart within 24 hours. Many countries on the Common Visa List (CVL) do not require visas to enter Malta. Further alignment is therefore required in this regard. Overall, Malta must continue its efforts to harmonise its legislation with the *acquis*. In particular, a law on data and privacy protection, the alignment of Malta's visa policy with the EU visa common list and the ratification of number of conventions for civil and penal judiciary co-operation, are necessary.
2001	Since the 2000 Regular Report, little progress has been made in Malta in the area of Justice and Home Affairs. No particular development can be reported as regards **data Protection** and **visa policy**. There has been some progress in the implementation of the acquis in the field of control of **external borders**, and as regards preparations for the **Schengen** agreement. The Ministry for Home Affairs set up a project team in November 2000 to oversee Malta's compliance with the Schengen *acquis*. The team drew up an action plan on the implementation of the *acquis*, which was submitted to the Commission in April 2001. The Action Plan addresses, among other things, staffing needs at border points and at the offices which will be connected to the SIRENE and National Schengen Information System, the Europol office, the aliens office, field operations and the analysis office. The project team is also acting in liaison with the Ministry of Foreign Affairs on the adoption of the Common Consular Instructions. Initial preparations are currently being made so that this Ministry would also make the necessary infrastructure and training preparations required for the implementation of the Schengen *acquis* and, in particular, those relating to consular co-operation.

	Overall assessment As regards **visa policy**, further alignment is required. The adoption of a timetable for alignment to that end is a step forward but actual implementation of the alignment plan needs to start. As regards **external borders** and preparations for **Schengen**, work on the drawing-up of a Schengen Action Plan is a positive development. The structure of the border control branch/immigration branch of the Police, including certain units of the Malta Armed Forces (MAF), is effective. Co-ordination among competent authorities, police and Armed Forces, should be pursued and strengthened. However, at present, the maritime squad is not able to guarantee full control of pleasure boats and domestic fishing boats on their way to the archipelago of Malta. Compared to present Schengen standards, equipment is still poor and generally needs to be improved, particularly the control line equipment and ship- and landbased surveillance devices.
2002	Malta has continued to make substantial progress in this chapter. Malta has made progress in aligning its **visa policy** with that of the EU. As from October 2002, in line with the timetable established by the Government, Malta has introduced visa obligations for nationals from a first group of 38 countries. Although Malta does not yet issue airport transit vias, measures were introduced regarding the endorsement of the passports of nationals of the twelve countries requiring an airport transit visa under the Schengen *acquis*. The Immigration Police has embarked on an information campaign by including information on the new visa requirement in magazines and by informing travel agencies. *Overall assessment* As regards **visas**, Malta has now a precise timetable for alignment with the EU visa list. It foresees introduction of visas with another small group of countries (Turkey, Morocco, Egypt, Tunisia) on 1 January 2003, while nationals of Libya will start requiring a visa to enter Maltese territory on the date of Malta's accession to the EU. Malta should now provide all diplomatic and consular missions abroad with security and technical equipment including on-line connection with the central immigration authorities. Malta needs to remove visa requirements for Romanian citizens and also to align with the EU *acquis* on airport transit visas. Malta is well advanced in the adoption of the **Schengen** *acquis*. It needs to continue its preparation for full implementation of the Schengen *acquis* by further developing the Schengen Action Plan, maintaining a clear distinction between the requirements that must be applied upon accession and those which are connected to the Council Decision for the lifting of internal border controls. It must also set a detailed and realistic timetable to put in place the necessary infrastructure to adapt the seaports and airport to the Schengen / EU requirements, and must prepare the national system for the linkage to SIS II and continue efforts to establish the SIRENE office. Currently Malta is preparing for the implementation of the Common Consular Instructions. This preparation involves all parties concerned, mainly the Malta Police Force, the Ministry of Foreign Affairs and the Armed Forces of Malta. An updated plan was finalised in October 2001 to acquire all the necessary equipment and provide the training required for the implementation of the *acquis* in

	this area, and now needs to be implemented. Discussions are also being held to plan the steps required to conclude consular co-operation agreements with one or more Schengen states. *Conclusion* Negotiations on this chapter have been provisionally closed. Malta has not requested any transitional arrangements. Malta is generally meeting the commitments it has made in the accession negotiations in this field. In order to complete preparations for membership, Malta's efforts now need to focus on completing alignment (visas, migration, customs co-operation) and on ensuring the implementation of the measures planned for the effective enforcement of the policies in this area, in particular as regards the Schengen Action Plan, asylum, data protection and money laundering.
2003	Preparation with regard to Schengen provisions (**Schengen Action Plan**) relevant to accession is broadly satisfactory, but efforts will be needed after accession to prepare for the lifting of internal borders and for full implementation of the Schengen *acquis* on the basis of a further decision to be taken by the Council. The Schengen Action Plan was recently updated. Malta should continue with the further enhancement of equipment, in particular passport readers at the points of entry. The lack of passport readers at Malta International Airport as a main entrance gate to Malta should be addressed with urgency. Although an IT programme has been established, preparations for integration into the Schengen Information System (SIS) II are still at a preliminary stage, in terms of the development of national applications. Malta should accelerate the implementation of this programme and allocate sufficient financial means and manpower. Malta is broadly in line with the requirements of the EU acquis concerning **visa policy**. Malta has introduced visa requirements for Turkey, Marocco, Tunisia and Egypt, but still has to make provision for introducing visas for Libya. Malta still has to align its policy as regards the so-called "positive" visa list. As regards implementation capacity further efforts are needed in relation to infrastructure, recruitment and training of staff, and installation of information technology for the consulates. Some structural modifications at the Tripoli embassy have been achieved. Malta also has to provide all diplomatic and consular missions with equipment to detect forged and falsified documents. *Conclusion* Malta is essentially meeting the commitments and requirements arising from the accession negotiations and is expected to be able to implement *the acquis* in the areas of **data protection**, **visa policy.**

9. POLAND

Year	Poland
1997 avis	Some 237 million border crossings were made in 1995. Many illegal migrants, especially from the NIS and increasingly from Asia, are seeking to cross to Germany, but also to stay in Poland, for economic reasons. At present the Polish Government does not have effective control on the residence of migrants and the new Aliens Law currently before Parliament aims to put in place an effective residence control system. Poland allows visa free visits from the West. Visa free access, with an invitation letter, is also allowed from NIS. Poland has in place the necessary legal and administrative measures covering deportation, detention and liability of carriers. Readmission agreements are in place with the Schengen countries, Greece, Bulgaria, Czech Republic, Hungary, Romania, Slovakia and Russia, Ukraine and Belarus. Border control is a particular priority for Poland. Parts of Poland's borders are vulnerable to exploitation by criminal gangs seeking to bring illegal immigrants to the West. Poland is working closely with some EU Member States, on both the Western and Eastern borders, to put in place the necessary procedures and facilities and is keen to develop these to the level that will allow it to accede to the Schengen convention. **Current and Prospective Assessment** Because of its geographical position (bordering the EU, several Associated countries and the NIS) its size and difficulties with reform in some areas, Poland is facing some significant challenges in the JHA sector. Poland has begun to take major steps to tackle these. For the most part the necessary domestic legislation and international conventions are in place, but important work still needs to be carried out on data protection and issues such as aliens law. Its visa policy towards the NIS is a matter of concern. The current major reform of the Ministry of the Interior is designed to improve the overall effectiveness of JHA institutions within the framework of the rule of law.
1998	A new Aliens Act came into force on 27 December 1997 aligned on EU law, particularly in terms of admission rules. There are as yet no implementing provisions. There has been steady progress on visa policy, one of the short-term priorities of the accession partnership. Waiver agreements with Armenia, North Korea and Vietnam have been rescinded, but the more urgent situation with Russia, Ukraine and Belarus has yet to be settled. **Conclusion** One of the short-term priorities in the accession partnership was better border control, particularly with Belarus and Ukraine, and alignment on the EU's visa arrangements. Progress has been recorded in both these areas.

1999	The challenges identified in the 1998 Regular Report in the areas of drugs, border controls, immigration, visa policy and international crime remain significant and the judicial process still requires extensive improvement. In respect of *immigration*, Poland is a transit country on the way to Western Europe for large groups of immigrants from the neighbouring region and Southern Asia. Poland should continue progressive alignment of visa legislation and practice with that of the EU. Poland still has to undertake efforts to align its visa policy to the EU line since nationals of states subject to visa obligation under EU rules may enter Poland without a visa, inter alia, Russia, Ukraine and Belarus. The 'official invitation' delivered by the local Polish Administration is not a substitute to the visa although it represents the first step towards a full control, since all such visitors are then registered. The improvements to the eastern *border* of Poland to make it comply with the requirements of an external EU border are seemingly proceeding in an 'ad hoc' manner. Aside from the purely JHA requirements due care is expected in safeguarding cross border and international relations with eastern neighbours and in establishing the proper sequential 'international co-operation' planning of the establishment of the future 'external border'. **Conclusion** Poland needs to address key deficiencies in the short term in particular the comprehensive reform of the legislation on foreigners should remedy the deficiencies in admission requirements and visa policy.
2000	Since the 1999 regular report, progress has been noted in general in Poland in all the areas covered by co-operation in the field of justice and home affairs" As far as development of the **visa policy** is concerned, the Polish government has now authorised the Minister of Foreign Affairs to start bilateral discussions on the canceling of visa free travel from Russia, Belarus and the Ukraine. This is an important policy signal, particularly in respect of the Ukraine where currently neither visa nor "voucher" system is required. In line with this, progress has been made over the past twelve months in the further strengthening of administrative capacity so as to be able to align the Polish visa regime. New consular offices have been opened in Russia, Armenia, and Mongolia, and three have been opened in the Ukraine. Upgrading of offices has also taken place in Kaliningrad, Minsk and Brest on the Belarus border. Computerisation of the visa issuing process has begun and is being extended to all consular offices, which will allow for positive vetting controls at the border posts which are already equipped with computerised passport reading technology. *Overall assessment*

	Some progress has been made in alignment with the *acquis.* **Visa policy** is moving towards alignment though a process of gradual adoption in parallel with the establishment of the necessary administrative capacity aimed at sustaining cooperation at the future external border.
2001	Since the 2000 Regular Report, fundamental legislative steps have been taken in Poland in the fields of border controls, police co-operation, data protection, visas and migration. However, only limited progress can be reported on the fight against fraud and corruption and in judicial co-operation. As far as **visa policy** is concerned, the amendment to the Aliens Act which was adopted in June 2001 and entered into force in July 2001 brings Poland into close alignment with the *acquis*. An "EU" format for Polish passports is provided for by a Regulation adopted in May. During the reporting period, Poland terminated visa exemption agreements with Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Cuba. The intended visa introduction for Belarus, Russia and Macedonia has not yet taken place, due to the fact that the negotiations with the countries concerned have not been completed, and due to a lack of funding. Visas continue to be granted at borders in increasing numbers. This practice is not in line with the *acquis*. A series of measures have been introduced in the past twelve months with a view to strengthening administrative capacity in this field. Since spring 2001, the Polish computer system for migration POBYT has been available on-line in the relevant Voivodship (regional) departments and at 72 border-crossing points. Some modest additional strengthening of consular structures has been undertaken compared to that reported last year. In order to prepare for the visa introduction for Ukraine, the location has been chosen for the opening of two new consular posts in Ukraine: Lutsk and Odessa. Poland adopted a Schengen Action Plan in August 2001. Poland adopted a Schengen Action Plan in August 2001. This constitutes a supplement to the Integrated Border Management Strategy for the planned legislative and institutional changes resulting from the Schengen acquis. *Overall assessment* With the 2001 amendments to the Aliens Act, Poland has largely completed the legislative alignment of its **visa policy** with that of the European Union. Poland has also terminated existing visa-free regimes with a large number of countries, and is preparing the imposition of visas on all countries necessary to ensure full alignment before accession. Visa-free regimes have still to be abolished in the cases of Belarus, Russia, Macedonia and Ukraine. The administrative capacity remains insufficient mainly due to lack of funding, despite further computerisation efforts. It is crucial for Poland to improve its administrative capacity and provide for the necessary funding in view of the very large number of visa applications expected.

	However, Poland's remaining lack of visa alignment in respect of Russia, Belarus and especially Ukraine (see above) is proving detrimental to the effectiveness of the border management. This is especially important as the pressure is increasing on the external borders, especially on sea borders.
2002	Since the 2001 Regular Report, little progress can be reported as regards visa policy. As far as **visa policy** is concerned, adjustments have been made since the last Regular Report to the timetable set out in the Polish National Programme for Preparations for membership for completing alignment with the *acquis*. Visas for Cuba were introduced, with some delay, in February 2002. As a first step in introducing visas with the Russian Federation, Belarus and Ukraine, in May 2002 Poland notified the national authorities about the termination of the agreement of 1985 (with the then Soviet Union) on simplified border crossing with these countries. The termination will take effect 12 months after notification, but until the full introduction of visas this measure is not expected to have a marked impact on bilateral traffic with these countries, since the agreement with the Russian Federation has in essence been frozen since 1994, and those for Belarus and Ukraine nationals concern about 6000 people a year. FYROM was notified in July 2002 of the termination of the visa-free agreement, with effect as of November 2002. With regard to development of human and material capacity during the reporting period, in December 2001 the Ministry of Foreign Affairs established a Co-ordination Unit for preparations for the introduction of the EU visa regime with the Russian Federation, Belarus and Ukraine as from July 2003. The plans include the development of infrastructure, including the opening of 2 new consulates in Ukraine (in Lutsk and Odessa), adjustments at 10 existing consulates in the Russian Federation, modernization of three consulates in Belarus, information technology equipment, staffing and training. The design phase of the information technology infrastructure for delivering visas in consular posts abroad has been almost completed, but implementation is not yet evident. Little progress seems to have been made since October 2001. Following the extension of the list of countries subject to visa obligations before entering Poland, the number of visas issued in the consular posts increased in 2001 to some 244 000, which was a 30% increase compared to 2000. The number of visas issued in Poland at the *voivodship* level (figures originating from the Office for Repatriation and Aliens) has, conversely, decreased, following the entry into force of the new Aliens Law, in July 2001. In 1998, almost 44 000 visas had been issued in Poland, compared to 13 446 in 2000 and 11 232 in 2001. In December 2001 a decision was taken by the Chief of the Border Guard Headquarters in consultation with the Ministry of Foreign Affairs to radically decrease from January 2002 the number of visas issued at border crossings. Actual practice should be in line with Schengen rules, which provide for visa issuance at the border only in exceptional cases. The results are tangible: whereas 2 825 visas were issued at the borders in the first quarter of 2001, only 256 were issued during the same period of 2002, which means a decline of more than 90%. *Overall assessment* Further efforts are required with respect to **visa** policy. The most difficult aspects of achieving full alignment with the EU visa *acquis* remain to be tackled.

	Poland still has to make provision for introducing visas for three of the countries with EU visa obligations: the Russian Federation, Belarus and Ukraine. As for the EU visa-free travel list, Poland has not yet completely aligned its visa policy. Indeed, nationals of some countries on that list are still required to obtain visas for travel to Poland (Australia, Canada, Brunei, Guatemala, Panama, El Salvador, New Zealand and Venezuela). Moreover, further adjustments may be required to the "invitation" procedure so as to address concerns that it does not fully meet the requirements of the *acquis*. Alignment with the list of countries for airport transit visas is also needed. The full alignment of the Polish visa policy will require a very significant strengthening of the administrative capacity to enable a number of visas several times greater than the current rate to be issued. Substantial efforts are required in terms of staff, since the consular staff should be considerably increased, and in terms of infrastructure, notably the extension of the consular network and the related information technology systems to diplomatic and consular representations and border crossing points. The equipment required for the detection of falsified documents, as recommended in the Council recommendations of May 1998 and April 1999, is not yet in place. The same applies for most of the border crossing points. Full compliance is still needed as regards the visa sticker and its security features. Negotiations on this chapter have been provisionally closed. Poland has not requested any transition periods under this chapter in the negotiations. Poland is meeting the majority of the commitments it has made in the negotiations in this field. There have been some delays in meeting the time-tables for introducing visas to third countries and in the case of the Russian Federation, Belarus and FYROM, these timetables have been revised.
2003	The most developed part of this chapter is the Schengen acquis, which results in the lifting of internal border controls. However, much of this acquis will not apply to the acceding countries upon accession, but only after a later separate Council Decision. The Schengen Implementation Action Plan aims at preparing this on the basis of a credible schedule for the introduction of the Schengen provisions. Binding rules which must be put in place as from accession include part of the rules on visas, rules on external borders and the acquis on migration, asylum, police co-operation, combating organized crime, fight against terrorism, fraud and corruption and drugs, customs co-operation as well as human rights legal instruments. Preparation with regard to Schengen provisions (**Schengen Action Plan**) relevant for accession is still broadly satisfactory, but certain delays have occurred in completing legal alignment as regards border control and surveillance. On **visa policy**, alignment with the regulation concerning visa-obligated and nonobligated countries is continuing. Poland has aligned its policy with the so-called "negative" list by the introduction, as from 1 October, of visa obligations for its three eastern neighbours: the Russian Federation, Belarus and Ukraine. Poland still has to fully align its policy as regards the so-called “positive” visa list. As regards implementation and administrative capacity Poland continues to face important challenges. Further efforts are needed in relation to infrastructure, recruitment of staff and training, as well as for installation of information technology for the consulates in the Russian Federation, Belarus and Ukraine. Furthermore, an adequate national visa register still needs to be established. Poland also has to provide all diplomatic and consular missions with equipment to detect forged and falsified documents.

	Conclusion Poland is partially meeting the majority of commitments and requirements for membership in relation to the **Schengen Action Plan, visa policy, external borders, fight against fraud and corruption** and **drugs** as well as **money laundering**.

10. ROMANIA

Year	ROMANIA
1997 avis	*Immigration/Border Control* Romania estimates there are some 18 000-20 000 illegal immigrants from Asia and Africa on its soil. Organized crime is involved in human trafficking. As a consequence of unsatisfactory visa, admission and border control policy, in the early 1990s the EU placed Romania on the list of third countries for which visas are required. Romania has now adopted the EU third country list, having suspended its visa-free agreements with 17 countries. The authorities have taken steps to reform visa-issuing procedures, to verify invitation letters, and tighten up passport-issuing procedures. A new law on foreigners is in preparation, aiming to tackle illegal immigration, clandestine labour, deportation of illegal migrants and to tighten up the residence regime. Readmission agreements are in place with 15 countries. Romania is also working to improve its border management systems; information networks are limited and the frontier guard remains largely unreformed. **Current and Prospective Assessment** Romania has made some progress in meeting the EU *acquis* in the area of asylum, but progress in other areas is limited. Accountability of the JHA authorities is in place formally, but the level of public scrutiny is, in practice, limited and prosecution of abuses rare. Romania's JHA institutions and the judiciary are at an early stage in the reform process. There is only very limited experience at official level of JHA cooperation with EU countries. Long-standing problems exist in the field of immigration, visa and border control policy which are only now being addressed. Organized crime is a particular problem and implementing mechanisms and instruments to address it are still at an early stage. Drug trafficking is a serious problem which is not effectively under the control of the authorities. **Conclusion** Romania faces particular challenges in the JHA area. Until now it has made only limited progress towards meeting the necessary conditions of the JHA *acquis*. It will be difficult to meet the *acquis* (present and future) requirements in the medium term. The necessary progress in this field is dependent on a more general institutional reform which derives from the political process.
1998	In July 1997 the Commission noted that Romania had particular problems in the area of justice and home affairs, particularly as regards supervision and control

	of enforcement agencies and the fight against organized crime and drugs. Little had been done to tackle issues such as immigration policy, issuing of visas and border control. Progress would depend on a process of generalized institutional reform. *Immigration /Border controls* Romania is both a country of emigration and a country of transit. It has extended (to 85) the list of countries whose nationals are subject to visa requirements, and on the EU's recommendation it now requires an airport/port transit visa from nationals of 12 countries. It has so far concluded readmission agreements with nine EU Member States and cooperation in this area is satisfactory. However, no significant progress has been recorded on border controls, though this was one of the three short-term priorities of the Accession Partnership and particular attention should be paid to the borders with Moldova and Ukraine and the port of Constanta. The reasons for this inaction include poor demarcation of the respective duties of border guards and border police and grossly inadequate training. Romania urgently needs to clarify the interdepartmental division of responsibilities and make a major effort to acquire surveillance equipment and information systems. This is one of the things that must be done before acceding to the country's request to be taken off the common list. *Conclusion* In the short-term priorities for the Accession Partnership the Commission called on Romania to step up its efforts to combat corruption and organized crime and improve border controls. No significant progress has been recorded in any of these three areas. There have been some improvements on visas and readmission policy, and seven major international legal instruments have been signed or ratified or have entered into force. Even on this front, however, Romania still has to ratify some agreements, including the European Conventions on Mutual Assistance in Criminal Matters and Money Laundering, and adopt the necessary implementing legislation. Broadly speaking what is required now is for Romania to give effect to the numerous reforms announced in the field of justice and home affairs, particularly the institutional reform urged on it by the Commission in July 1997, and allocate the human and financial resources necessary for their effective implementation .
1999	In the 1998 Report the Commission concluded that no significant progress had been achieved on combating corruption and organized crime and improving border control. Some progress was registered on visas, readmission policy and adoption of a number of international legal instruments. It was concluded that Romania broadly speaking should give effect to the numerous reforms announced in the field of justice and home affairs, particularly the institutional reform, and allocate the human and financial resources necessary for their effective implementation.

	Immigration/Border control So far as *immigration* is concerned, illegal frontier crossing is considered since June 1999 as an criminal act punishable by 3 months to 2 years imprisonment. Similarly the act of recruiting, directing and guiding a person with the purpose of illegal frontier crossing is also considered a criminal act which, in 'aggravating circumstances', can be punished by up to 7 years imprisonment. Despite these legal developments, the 1969 Aliens Law is still in force and Romania should give the highest priority to the adoption of a new law on foreigners fully in line with the acquis, especially in the fields of rights of residence of foreigners and the provision regarding the exit of foreigners from Romania. Romania continues to be concerned by EU visa requirements for its citizens and requests that this restriction be lifted. The requirement is perceived as discriminatory and as creating a practical obstacle in particular to business links and to activities in the context of European Integration. The visa requirement has so far been maintained because of insufficient internal control on immigration and control at the external borders. Romania has taken a number of measures to comply with the EU visa requirements. On the basis of a Government Ordinance of June 1999, the procedures for granting visas have been significantly streamlined with effect as from January 2000 : visas will no longer be granted at the border posts but exclusively by the diplomatic missions and consular offices of Romania. But there are still many differences between the EU and the Romanian lists of countries whose nationals need a visa. Romania should continue progressive alignment of visa legislation and practice with that of the EU. In 1999, Romania has signed a readmission agreement with Denmark. Romania has now 19 readmission agreements: 12 with EU Member States, 5 with other associated countries, one with Switzerland and one with India. 7 new agreements are under negotiation. Romania has accepted the Constitution of the International Organization for Migration and was admitted as full member in November 1998. Within the last year the number of foreign citizens not permitted to enter Romania has doubled. So far as *borders* are concerned, the process of restructuring the institutions in charge of border management and control has started. In June 1999 a Government Ordinance modified the Law on the State Frontier to bring the Border Guard and the Border Police under the single authority of a "Border Police General Inspectorate". A pilot project coordinated by the Ministry of the Interior was then carried out in order to test the effective functioning of this "unified structure". Several expert missions have been carried out that has resulted in the identification of a number of short-comings. On this basis an ambitious multi-annual programme was launched to upgrade the equipment at the borders, priority being given to the frontier with Ukraine and Moldova, including the Danube delta. The implementation of this programme, which will take several years, is an urgent necessity since, for example, out of the 64 border points of Romania only 5 have proper equipment to check the validity of passports and visas.

	The positive evolutions mentioned above should now be confirmed through the full merger between Border Guard and Border Police, the implementation of a common high quality training, the actual demilitarization of these services and the replacement of conscripts by professional policemen according to a clear and rigorously implemented plan. There is also a particular need to continue strengthening the infrastructure and equipment, including men outfit, at the border-crossing points and on the green and blue frontiers. In the context of the pre-accession strategy, and need to reinforce the future Eastern border of the EU the Commission intends to continue to provide important assistance in this field. However, Romanian should support this equipment programme by improving the pay and the working conditions of Border Guards and Border Policemen. **Conclusion** There has been some progress in the field of Justice and Home Affairs, with the exception of asylum and drugs. The most significant progress is registered in the field of justice but some progress is also visible on immigration, border management and police. Short term priorities of the Accession Partnership have therefore been partly met. Romania must now urgently implement the important measures announced by its authorities. Some important pieces of legislation have to be adopted or amended and the restructuring and modernization of the relevant administrations, especially those depending from the Ministry of Interior, have to be completed so as to ensure an effective implementation of the legislation. In particular, the demilitarization of the Ministry of Interior and its subordinated institutions, primarily the Police and the Border Police General Inspectorate is a priority which must be implemented without delay. In most Justice and Home affairs sectors, there is a widespread need for improvement of pay and working conditions, training and equipment. Regarding equipment, the programme for upgrading the borders should be carried on according to a precise and well monitored schedule. It is important that Romania rapidly takes further measures to strengthen the effective implementation of the visa policy, with a view to the forthcoming decision in the Council on the new visa list.

2000	As far as **visa policy** is concerned, the Aliens law from 1969 is still in force. A proposal for a new aliens law has been adopted by both the Senate and the Chamber of Deputies and is presently being dealt with by the Conciliation Committee of the two houses of the Parliament. Starting from 1 July the Romanian authorities introduced restrictive conditions for issuing visas for citizens of a number of former USSR countries. Romania has now a restrictive visa regime with all former USSR countries except Moldova. From August 2000 a visa regime has been introduced towards several countries in the Caribbean Sea and the Pacific Ocean. The decision not to grant visas at border points except in special cases has been postponed as regards nationals of EU and NATO Member States, Israel, Switzerland, Japan and Australia. As far as **border control** is concerned, a new organisational structure came into force in July 2000 under which the regional commands, which previously covered several counties, have been split up into many small units. The process of demilitarisation has also started and new training programs are being developed for border police officers. Amendments in the law on the Romanian State Borders in June 1999 set up the General Inspectorate of the Border Police which has jurisdiction over all state borders and is also responsible for the Coast Guard service. However, the full revision of the law on the state borders and the elaboration of a law on the functioning and organisation of the border police have not yet been adopted. Regarding **migration**, two new readmission agreements have been concluded, one with Ireland and another with Bulgaria. *Overall assessment* Some important legislation has been adopted recently in the field of justice and home affairs but it remains a cause of concern that some of this legislation has been adopted through government ordinances without proper consultation. Much remains to be done on legal approximation and on strengthening administrative capacity. Especially the process of reforming the border police and the national police should be speeded up and the corruption problem needs to be addressed with radical measures. Despite recent reforms of **visa policy** Romania still needs to align the list of countries whose citizens need a visa to enter Romania with the equivalent list for the EU. The data information system for issuing and checking visas also needs to be improved. There is not yet an on-line data transmission system for visa applications between the Romanian diplomatic missions abroad, the central administration in Bucharest and the Romanian border posts. Visa stickers are manufactured with methods using special ink and laser components. Romanian passports are manufactured with a safety proof technique which complies with international standards for machine-readable passports. A new type of passport is envisaged, containing security features fully compatible with Schengen requirements. Romania is one of the main transit countries for illegal immigration to Western Europe. In the field of **border control** there is a lack of equipment especially for night surveillance. Progress is also needed to prepare for future participation in the Schengen co-operation where there is among other things a need to rebuild terminals at many airports. Due to the high costs involved, such plans have been delayed. The laws on the state frontier and on the border police need to be revised. The reform of the border police has started but so far there has been little

	impact at the operational level. Further initiatives need to be taken to restructure and strengthen the Border Police. The progressive replacement of conscripts by contracted sergeants should continue. Training of staff needs to be developed and there is a need to develop a long-term border management strategy and interagency co-operation. Community assistance through the annual border programmes needs to be complemented by substantially increased national budget allocations. Regulation regarding **migration** is very limited due to the continued application of the 1969 Aliens Law. There are at present 13 agreements on readmission concluded with EU Member States and 8 agreements with other countries. There is a need to conclude more readmission agreements with neighbouring countries as well as with countries of origin for illegal immigrants. There is also a need to adopt adequate provisions on illegal immigrants and in particular to clarify the procedures for their expulsion. *Overall assessment* Despite recent reforms of **visa policy** Romania still needs to align the list of countries whose citizens need a visa to enter Romania with the equivalent list for the EU. The data information system for issuing and checking visas also needs to be improved. There is not yet an on-line data transmission system for visa applications between the Romanian diplomatic missions abroad, the central administration in Bucharest and the Romanian border posts. Visa stickers are manufactured with methods using special ink and laser components. Romanian passports are manufactured with a safety proof technique which complies with international standards for machine-readable passports. A new type of passport is envisaged, containing security features fully compatible with Schengen requirements. Romania is one of the main transit countries for illegal immigration to Western Europe. In the field of **border control** there is a lack of equipment especially for night surveillance. Progress is also needed to prepare for future participation in the Schengen co-operation where there is among other things a need to rebuild terminals at many airports. Due to the high costs involved, such plans have been delayed. The laws on the state frontier and on the border police need to be revised. The reform of the border police has started but so far there has been little impact at the operational level. Further initiatives need to be taken to restructure and strengthen the Border Police. The progressive replacement of conscripts by contracted sergeants should continue. Training of staff needs to be developed and there is a need to develop a long-term border management strategy and interagency co-operation. Community assistance through the annual border programmes needs to be complemented by substantially increased national budget allocations. Regulation regarding **migration** is very limited due to the continued application of the 1969 Aliens Law. There are at present 13 agreements on readmission concluded with EU Member States and 8 agreements with other countries. There is a need to conclude more readmission agreements with neighbouring countries as well as with countries of origin for illegal immigrants. There is also a need to adopt adequate provisions on illegal immigrants and in particular to

	clarify the procedures for their expulsion.
2001	As far as **visa policy** is concerned, the conditions and criteria for obtaining visas have been specified in methodological norms implementing the new Law on Aliens and in common instructions agreed by the Ministry of Foreign Affairs, the Ministry of Interior and the Ministry of Labour. The new Law on Aliens and the provisions on visas were adopted in April 2001. Particularly strict conditions are applied to citizens of 86 countries with high migratory tendencies. Since 1 January 2001, visas can, as a rule, only be obtained from Romanian diplomatic missions and consular offices. They are only issued at border posts in exceptional cases. Since 1 July 2001, Moldovan citizens have needed to have a passport to enter Romania. All visa applications are sent from the diplomatic or consular missions to the National Visa Centre, which takes the final decision on the issuing of a visa. The applications from nationals of countries with high migration tendencies are also sent, for a further check, to the Directorate for Aliens and Migration Issues of the Ministry of Interior. A new Schengen-compatible type of visa application form has been introduced. Training activities have been carried out as regards preparations for the **Schengen** Agreement. Otherwise there have been no significant developments in this area. As regards **migration,** a new Aliens Law entered into force in May 2001, establishing the conditions for entry and stay in Romania as well as the regime for expulsions. As indicated, the Government also adopted the 'methodological norms' to implement the above-mentioned law. These norms contain detailed provisions specifying the procedures for applying the law as regards checking of documents, issuing visas, granting residence rights and expelling aliens. Recently adopted legislation has also tightened the conditions for obtaining work permits in Romania**.** A necessary pre-condition is the possession of a work visa (i.e. persons having a student visa are therefore no longer allowed to obtain a work permit). The Government has signed an agreement with the International Organisation for Migration, to establish a centre offering temporary protection for women victims of trafficking as well as managing programmes supporting their reintegration into society. In 1998, 2,830 foreigners were expelled for not complying with the conditions of entry and stay in Romania. This number increased in 1999 to 3,431 aliens, but then decreased to 2,498 in 2000. *Overall assessment* Romania has also made significant progress in aligning its **visa policy** with that of the European Union. There are 156 countries whose citizens need a visa to enter Romania, while nationals of 35 countries, including the EU Member States, are exempted from the visa requirement. Further alignment with the EU visa policy should continue, in particular with regard to the introduction of visa obligations for countries with high migration potential. Romania should start the preparations for participation in the **Schengen** area and develop a Schengen Action Plan.

	Romania has concluded readmission agreements with all Member States except the United Kingdom and Portugal. These agreements are all in force, except the agreements with Finland and Ireland, which have been signed but not yet ratified. In addition, 6 readmission agreements with candidate countries (Poland, Slovakia, the Czech Republic, Slovenia, Hungary and Bulgaria) are in force. There are also agreements with Switzerland, India, Croatia and Moldova. The Romanian Government has re-negotiated the readmission agreements with Sweden, Slovenia and Hungary in order to update and align them with the relevant EU recommendations and standards. For the same purpose the agreement with Austria is in the process of negotiation.
2002	As far as **visa policy** is concerned, over the past few years Romania has brought its visa policy largely in line with the policy of the EU. As a result, since January 2002 Romania has enjoyed a visa-free regime with all Schengen Member States. Romania adopted provisions that entered into force at the same time as the visa-free regime which stipulate that Romanian nationals travelling to countries where an entry visa is not required must prove that they have sufficient resources to cover the intended stay abroad, a return ticket and valid health insurance. Romania does not yet comply with the *acquis* as regards the list of countries whose nationals do not need a visa to enter the EU. During the reporting period bilateral agreements to lift visa obligation entered into force with Latvia, Liechtenstein, Malta and Venezuela. A visa obligation was introduced in January 2002 for nationals of Bosnia-Herzegovina and Romania has decided to introduce the visa obligation for nationals of FYROM from the beginning of 2003. Romania does not yet require visas for nationals of the Federal Republic of Yugoslavia, the Republic of Moldova, the Russian Federation, Turkey and Ukraine. New consular instructions entered into force in July 2002 stipulating that visas can only be issued by diplomatic and consular missions. This puts an end to the practice of issuing visas at border crossing points. As regards **migration**, progress has been rather limited. With regard to uniform residency permits, Romania adopted in June 2002 legislation for the issuing of new Romanian identity and state border crossing documents for third country nationals. Over the last year, readmission agreements were ratified with Albania, Austria, Croatia, Hungary, the Republic of Moldova and Sweden. Agreements with Lebanon and Norway were signed. The Directorate for Aliens and Migration Issues, which is the central co-ordinating body, has concluded co-operation protocols with the General Directorate for Combating Organized Crime and Drugs Traffic and with the national carrier in order to return illegal aliens to their country of origin or of departure. In June 2002 the Government concluded an agreement with the International Organisation for Migration on co-operation in the field of voluntary humanitarian assisted repatriation. *Overall assessment* Romania has further aligned its **visa policy** with that of the European Union. However, further steps towards full alignment are required - in particular as regards the list of countries whose nationals need a visa to enter the EU and the list of countries whose nationals are exempted from such an obligation. Romania should

	take appropriate measures to make the features of the national visa sticker more secure. Administrative capacity remains insufficient: the National Visa Centre is understaffed and technical equipment available to visa issuing services remains poor. Romania should step up efforts to provide all diplomatic and consular offices with technical equipment for detecting forged and falsified documents, focusing in particular on high-risk countries. The **Schengen** Action Plan which the Romanian authorities have presented needs to be further elaborated and should cover all policy areas included in the Schengen *acquis*. A clear distinction should be made between the requirements that must be applied upon accession to the EU and those which are connected with the eventual Council Decision on the lifting of internal border controls. Romania should continue its efforts to establish an operational National Information System containing Schengen-compatible data. As to **migration**, considerable efforts in terms of both legal approximation and administrative capacity are still required. Legislation needs to be amended in several areas such as entry and stay of third-country nationals for the purposes of employment, self-employment and studies, long-term residents and unaccompanied minors. In order to comply with the *acquis*, Romania must also introduce the possibility of lodging an appeal with suspensive effect against expulsion decisions and return measures. Romania has concluded 27 readmission agreements in total. It should continue these efforts, focusing above all on risk countries.
2003	As far as **visa policy** is concerned, the new Aliens Law introduced the distinction between short- and long-term visas, introduced special provisions regarding citizens from EU member states, and eliminated exit visas. A new visa sticker was approved in April 2003 for use from the beginning of 2004. From January 2003 Romania introduced a visa obligation for nationals from the former Yugoslav Republic of Macedonia. A bilateral agreement to lift visa obligations entered into force with Singapore in February 2003 and a similar agreement has been reached with Estonia. A visa-on-line computer system linking Romanian consulates, the Ministry of Foreign Affairs, the Ministry of Administration and Interior, and local units within the Directorate for Aliens and Migration Issues is being installed. The number of Romanians who were not permitted to exit the country increased from 23 311 in 2001 to 417 969 in 2002. In the area of **migration**, a new Aliens Law was adopted in December 2002 that contained provisions on the entry and stay of third-country nationals for the purposes of employment, self-employment and studies, long-term residents, unaccompanied minors, appeals against expulsion decisions and return measures. In May 2003 the government issued a decision lifting the obligation for long-term visas for economic and commercial activities for nine of the acceding countries. The Directorate for Aliens and Migration Issues, the central co-ordinating body, was nominated as the Aliens Authority. The Directorate concluded co-operation agreements with a number of government agencies and collaboration with the National Refugee Office has improved. Re-admission agreements were signed with UK, Portugal and Latvia during the reporting period. In February 2003 an Emergency Ordinance suspended the passports of Romanians who have committed offences abroad. Romania reached an agreement in October 2002 to facilitate the return of minors staying illegally in France. There was also a sharp reduction in the number of foreign nationals detected attempting to cross the Romanian border illegally, down from 3,577 in 2001 to 2,045 in 2002 (of which three-quarters were trying to enter Romania). The number of Romanians returned from the Schengen Area increased from approximately 9,000 in 2001 to over

	11,000 in 2002 and almost 10,000 for the first half of 2003. *Overall assessment* As far as visa policy is concerned, the visa-free regime introduced for Romanian nationals by Schengen member states in January 2002 has had mixed results. Despite an almost eighteen-fold increase in the number of Romanians who were not permitted to exit in 2002 compared to 2001 and an overall decrease in exits from Romania by more than a million, the number of Romanians returned from the Schengen Area has continued to increase. Romania has made some progress amending the list of countries whose nationals are exempted from visa obligations but does not yet fully comply with the *acquis*. Romania is in the process of aligning with the *acquis* on the list of countries whose nationals require a visa to enter the EU and is engaged in negotiations to introduce visas with Ukraine and Turkey, will enter into negotiations with Serbia and Montenegro, has finalised an agreement with Russia, and will apply visas to Moldovan nationals upon Romania's accession to the EU. Human resources in the area of visa policy have not changed significantly during the reporting period. Thorough training in the new visa-on-line system will be required if this is to make an appreciable impact in the future. General administrative capacity remains low with significant room for improvement especially as concerns risk analysis. Romania should step up efforts to provide all diplomatic and consular offices with the necessary technical equipment, particularly in high-risk countries. In the field of migration, the Directorate for Aliens and Migration Issues is capable of managing re-admission and expulsion to remote countries. Despite the strict self-imposed exit requirements, and the fact that Romanians sent back to Romania face up to five years in prison, there has been an increase in the number of Romanians returned from EU member states. The large numbers of Romanian nationals involved in petty crime, aggressive begging and other anti-social behaviour across the EU has prompted several member states to take action. The southern border with Bulgaria is the one most targeted by those attempting to enter Romania illegally and the good co-operation between both countries is therefore welcomed. The agreement on co-operation in the field of voluntary humanitarian-assisted repatriation concluded last year with the International Organisation for Migration has not yet been ratified by Romania. Co-operation with the United Nations High Commission for Refugees is gradually improving.
2004	As far as **visa policy** is concerned, Romania introduced a visa regime for four countries on the EU's negative list (Russia, Turkey, Ukraine, and Serbia and Montenegro) during the reporting period. The visa obligation was abolished for four countries on the EU's positive list, namely Switzerland, Liechtenstein, Estonia and Lithuania. During 2003 a total of 808 visas were issued at Romania's borders. The first phase of the "visa-on-line" system is now operational and links the Aliens Authority in Romania with diplomatic missions in Russia, Ukraine, Turkey, Serbia and Montenegro, and Egypt. Additional staff working on visa issues has been deployed to the diplomatic missions of most of these countries. The number of staff in the National Visa Centre has doubled from 5 to 10 and the total number working in the General Directorate of Consular Affairs is now 40. The number of Romanians who were not permitted to exit the country almost tripled from 417,969 in 2002 to 1,216,625 in 2003. In 2003 there were 18,138 Romanians returned from the Schengen Area and during the first half of 2004 this trend was again upwards as there were 12,000 returns.

	In the area of **migration**, a national migration strategy was adopted in April 2004 and the Aliens Authority was established as an autonomous body in March 2004. A Head of Authority has been appointed and 430 out of the 611 attributed posts are now filled. The Authority also signed a co-operation protocol with the General Directorate for Consular Affairs and is now connected to the National Visa Centre through the "visa-on-line" project. Readmission agreements were signed with Macedonia, Estonia, Turkey and Lithuania. The Authority is consulted by the National Visa Centre on cases and applications for extension of the right to stay. Official statistics indicate that the Authority was consulted by the National Visa Centre in 4,369 cases (giving negative advice in 1,332 cases) and handled 36,607 applications for extension of the right to stay (rejecting 1,260). *Overall assessment* On visa policy, while Moldova is now the only country on the EU negative list with which Romania has not introduced a visa regime, the agreements signed with Russia, Turkey, Ukraine, and Serbia and Montenegro during the reporting period are not fully in line with the Schengen *acquis* and will need to be revised. Additional effort will also be needed to ensure abolition of the 17 remaining visa regimes for countries on the EU positive list and the agreements already negotiated with Bulgaria, the Czech Republic, Croatia, Poland, Slovakia and Singapore need to be brought fully into line with the *acquis*. There should also be an acceleration in the roll out of the "visa-on-line" system in order to ensure full implementation by the end of 2004. Printing facilities have now been secured for the new visa stickers but efforts should be stepped up to ensure that they can be issued as planned in September 2004. The numbers of those attempting to exit Romania without fulfilling the legal requirements again rose sharply over the reporting period. The reinforcement of staff and equipment played a significant role in increasing the numbers of detections, but as the statistics continue to indicate a growing emigration pressure at Romania's borders as well as an increase in the number of Romanians being returned from the Schengen area, additional resources may be required in the future. In the field of migration, the establishment of the Aliens Authority as an autonomous body represents a positive development and its administrative capacity has been enhanced through the creation of additional posts, training with EU Member States and acquiring IT equipment. Additional efforts are required to fill the 30% of posts that still remain vacant, especially as the total number of current staff actually fell during the reporting period from 490 to 430. A significant level of economic migration remains a feature of Romanian society: an estimated 1.7 million Romanians have already migrated in search of work.
2005	On **visa policy**, Romania has to a large extent adopted the provisions and administrative structures needed to ensure effective implementation of the *acquis* upon accession. Moldova remains the only country on the EU negative list with which Romania has not introduced a visa regime, and negotiations are ongoing to align fully the agreements already signed with Russia, Turkey, Ukraine, and Serbia and Montenegro with the Schengen *acquis* before accession. Furthermore, the EU has just concluded an agreement with Russia on visa facilitation which, upon its entry into force, will replace bilateral agreements on short-term visas concluded by Member States. Additional effort will also be needed to ensure abolition of the 12 remaining visa regimes for countries on the EU positive list. The second phase of the roll out of the "visa online" system has been concluded and it is planned that the remaining consular offices be connected by July 2006.

	Romania needs to start preparing for the implementation of Visa Information System (VIS) in view of lifting the internal borders upon accession to Schengen. Additional efforts are required to install more sophisticated equipment to detect forged and falsified documents in diplomatic and consular posts especially in high-risk countries. New visa stickers with some of the EU security and antiforgery features started being issued on schedule in September 2004. While visas are issued only at the border in accordance with the Schengen criteria, visa stickers should replace stamps as soon as possible and the latest upon EU accession for security reasons. In the area of **migration**, the legislative framework is now well aligned with the *acquis* and a new reception centre has opened. Romania has concluded and ratified 30 readmission agreements. Implementation of the National Migration Strategy has continued and in January 2005 a Plan was approved to combat illegal immigration. There are currently 118 vacancies in the Authority for Aliens and a number of its territorial structures are still not connected to the IT network. Practical co-operation with the Border Police on cross-border crime and illegal overstays has improved. Immigration liaison officers are posted in 12 EU Member States and in Bulgaria and Ukraine. *Conclusion* Romania is generally meeting the commitments and requirements arising from the accession negotiations and is expected to be able to implement by accession the *acquis* in the areas of **migration**, **asylum,** the **fight against terrorism**, **customs co-operation**, and **human rights legal instruments**. Increased efforts are required if Romania is to meet the requirements for membership in relation to the implementation of the **visa policy, data protection**, **police co-operation and the fight against organized crime, money laundering, judicial co-operation in civil and criminal matters,** and the **fight against drugs.** Further attention is needed in several areas including significantly increasing staff levels, equipment and training for the Police and Gendarmerie; enhancing the fight against drugs; and making the Authority for Personal Data Processing fully operational by increasing its staff, ensuring its budget and considerably strengthening the implementation of data protection legislation, without which there is a risk that Romania may not be ready to implement the acquis in this area.

11. SLOVAKIA

Year	Slovakia
1997 avis	Some 89 million border crossings were made in 1995; of these some 2,000 were revealed as being illegal. Slovakia is working towards the EU list of third countries for which visas are required, but visa-free agreements are still in place with Belarus, Russia, Cuba, Romania, Bulgaria and Ukraine (for the latter invitation letters are required). The 1995 law on Residence and Border Crossing regulates residence, visa and border crossing procedures. Readmission agreements are in place with Austria and its other neighbouring countries, Romania, Croatian Slovenia and Bulgaria. Slovakia is currently negotiating such agreements with the Benelux countries and Germany. Border management is currently being modernised. **Conclusions** Slovakia appears to have the administrative capacity and infrastructure to meet the justice and home affairs *acquis* (present and future) in the medium term. But it will have to demonstrate its commitment to introduce the necessary reforms, notably in the development of visa policy toward the NIS, border management and migration control, extradition, and combating organized crime and corruption.
1998	In its July 1997 Opinion, the Commission had stressed that Slovakia had to prove its commitment to carrying out the reforms needed, particularly with regard to visa arrangements. Though there has been no general revision of the laws regarding foreign nationals, there have been isolated examples of progress, such as the new passport law, which entered into force on 1 January 1998 and gives every citizen the right to a passport. With regard to visa policy, progress remains very limited. A working party has been set up to prepare the necessary changes, but these have not materialised, despite the urgency of the matter. **Conclusion** Despite the progress made with legislation, a number of adjustments are still needed. Actual implementation of legislation has moreover seen very limited progress. Although no short term priorities were set out in the Accession Partnerships, an effort in combating organized crime would have been timely. It matters all the more that a genuine effort should be made with the medium-term priorities, particularly border controls and the implementation of asylum and migration legislation (including bringing visa policy closer to that of the Community).

1999	There was no progress concerning the alignment of the Slovak visa legislation to EU - requirements particular with regard to Belarus, Russia and Ukraine. The visa sticker has still not been introduced. Even though the detection rate for illegal border crossings was on the rise (8.320 persons in 1998; 5000 in 1999 up to the end of September) the Slovak *border* guards still lack training and the equipment needed in order to guarantee an efficient control of the borders. Slovakia should continue progressive alignment of visa legislation and practice with that of the EU.
2000	Since the 1999 regular report, significant progress has been registered in the Slovak Republic in the fields of visa and asylum. As far as **visa policy** is concerned, the amendment to the Law on the residence of foreigners entered into force in April. It includes provisions on the issuing of visas. Visas are no longer granted at borders, except for humanitarian reasons. Visa stickers were introduced as of 1 January 2000 replacing the old visa stamps. Harmonisation of Slovakia's visa policy continued. The Government introduced a visa requirement for Ukraine with effect from end of June 2000 and decided to abolish the current non-visa regime with Russia and Belarus as of the beginning of next year and with Cuba not later than six months prior to the entry of Slovakia to the EU. In May 2000, the Border and Foreigners Office was established. It is responsible for granting various forms of stay to foreign nationals who come to Slovakia to work, to study or who have received refugee status. It is, at the same time, the appeal body for decisions made by first instance bodies of the police force concerning visas, stays and expulsion. *Overall assessment* By introducing **visa** stickers, Slovakia has met one important short-term priority of the 1999 Accession Partnership. Yet, efforts to upgrade and complete the visa system have to be maintained. In particular, an on-line system for issuing visa and a central registration system need to be established.
2001	Since the 2000 Regular Report, some progress has been made in Slovakia in the field of justice and home affairs. Particular progress can be reported in the fields of border control, visa policy and police co-operation. As far as **visa policy** is concerned, in June 2001 the Slovak Government approved a new Visa Policy Concept**,** aiming at further harmonising its policy with the *acquis*. The Slovak Republic has terminated the Agreement on a visa-free regime with Ukraine and the Agreement between the Slovak Republic and Ukraine on simplified border-crossing procedures for nationals with permanent residence in municipalities in the border areas. The Government adopted a Resolution in January 2001 according to which specific categories of persons may receive their visa free of charge or at a reduced charge, implying a partial softening of the regime. A visa requirement was introduced for nationals of Belarus and the Russian Federation with effect from January 2001.

	Slovakia adopted its Schengen Action Plan in September 2001. *Overall assessment* The existing legislation for visa issuing procedures is partly in line with the *acquis*. The Slovak Republic has legislation that regulates the format of visas comparable with the legislation and practice of the EU member states. Partial alignment has so far been achieved with the relevant *acquis*. **Visa policy** needs to be updated to prepare for full alignment with the relevant EC Regulation and the setting-up of an on-line system for the issuing of visas and a central register has yet to be achieved. The Slovak Republic has yet to publish the list of countries whose nationals will be required to be in possession of airport transit visas. The Agreement on a visafree regime concluded with Cuba is to be terminated. As regards administrative capacity, Slovakia has not yet completed the on-line system for the issuing of visas, nor a central visa register.
2002	Since the 2001 Regular Report, further progress has been made in this area, particularly in the fields of data protection, visas, border control, migration, asylum and police cooperation. Slovakia has made good progress in aligning its **visa policy** with that of the EU. The new Act on the Stay of Foreigners, which entered into force in April 2002, specifies the type of visas which may be issued (short term, long-term, transit and airport transit visas) as well as the procedures for their issuance. Consular Instructions, which are intended to ensure alignment with the Common Consular Instructions, entered into force in June 2002. Slovakia has almost completed alignment with the Regulation on visa requirements for countries which are under visa obligation, except for Cuba, South-Africa and the Seychelles, for which the visa obligation will be introduced six months before accession at the latest. Slovakia needs to complete alignment as regards countries which are exempt from the EU visa obligation. It still needs to sign agreements on abolition of visa requirements with 16 countries and 2 Special Administrative Regions as well as to amend valid agreements with Malaysia and Italy. As regards administrative capacity, a central visa authority, which is part of the Border and Aliens Police Force, was established in February 2002. In addition, in order to complete the on-line system for issuing visas and the central visa register, a number of new on-line connections were established in April 2002. A new visa sticker was also introduced in April 2002, in order to meet EU security standards. *Overall assessment* Concerning **visa policy**, adequate implementation of the Act on the Stay of Foreigners must be ensured. Slovakia should also continue to implement the plan for alignment with the Regulation on visa requirements, in particular as regards harmonisation with the EU visa-free travel lists. In addition, Slovak travel documents do not yet fulfil EU security standards. Furthermore, Slovakia should equip all its consular and diplomatic missions abroad with the full range of equipment necessary to detect false and falsified documents. Negotiations on this chapter have been provisionally closed. Slovakia has not requested any

	transitional arrangements in this area. Slovakia is generally meeting the commitments it made in the accession negotiations in this field. In order to complete preparations for membership, Slovakia's efforts now need to focus on completing legislative alignment (visa, migration, judicial co-operation), and in particular on further reinforcing the administrative capacity in order to strengthen border control management, the fight against illegal immigration and organized crime, including trafficking in human beings and drug trafficking, and to improve capacity in combating fraud and corruption.
2003	On **visa policy**, Slovakia has not yet achieved full alignment with the EU visa *acquis.* Slovakia still has to terminate the visa-free agreements with Cuba, South Africa and Seychelles. Slovakia is not yet fully aligned with the "positive" visa list and should accelerate this process as regards the remaining countries. In addition, the law on expatriate Slovaks needs to be amended, so as to achieve full alignment with the *acquis* on the necessary requirements. As regards implementation and administrative capacity, Slovakia is in the process of extending to all embassies and consulates the on-line system capable of securing direct contact between visa-issuing authorities and the central authorities. The full range of equipment necessary to detect forged and falsified documents has not yet been completely provided to all diplomatic and consular missions. *Conclusion* Slovakia is partially meeting the commitments and requirements for membership in relation to the **Schengen Action Plan, data protection**, **visa policy, external borders, asylum** and the **fight against fraud and corruption**.

12. SLOVENIA

Year	Slovenia
1997 avis	Some 190 million border crossings were made in 1995; of these some 4,200 were revealed to be illegal. Migrants are coming from Romania, Sri Lanka, Turkey and China. Slovenia follows the EU list of third countries for which visas are required and uses the EU standard visa format. Residence and immigration issues relating to aliens are covered by the 1991 law on Foreigners. Readmission agreements are in place with Austria, Benelux, France, Greece Hungary, Croatia, Switzerland, Slovakia, Romania and Canada. Border management is thorough and effective.
1998	In December 1997, new legislation on national identity documents came into being. This made them harder to forge and made provision for entries in Slovene to be supplemented by the other national languages in the regions concerned, plus an English translation. In the short term, legislation on foreign nationals is indispensable and border controls must be improved. This raises the issue of determining the border with Croatia, an important matter in that it will be an external frontier of the Union. This concern derives from the fact that Slovenia, having lifted its geographical reservation, is becoming a transit country for illegal immigrants, mainly from Croatia and Hungary; it would therefore be desirable to set up programmes to assist return. **Conclusion** Beyond measures connected with the police, Slovenia has taken few significant steps since July 1997. If it is to attain the medium-term objectives set in the Accession Partnership, it needs to make a substantial effort in the following areas : - legislative policy, from the point of view both of international instruments (e.g. Convention on the Suppression of Terrorism) and of making adjustments to domestic laws (e.g. asylum and drugs); - stepping up training to enable staff to cope with enforcing new legislation, particularly that dealing with foreign nationals.
1999	There has been very considerable progress in the adoption and revision of legal instruments. So far as *immigration* is concerned, a new Law on Foreigners was adopted in July 1999 as well as the Law on the Status of Citizens of the other SFRY Successor States. In June 1999, Slovenia annulled visa exemption agreements with FYROM and Turkey. Turkish citizens will need visas as of 1 December and citizens of FYROM since 1 September 1999 to enter Slovenia. Slovenia should continue progressive alignment of visa legislation and practice with that of the EU. The issue of final demarcation of the border with Croatia is still outstanding. Slovenia has still to adopt a new law on border control. Border controls must indeed be reinforced, especially at the green border with Croatia since Slovenia is becoming a transit country for illegal immigrants, mainly from Croatia and Hungary.

	Particular attention should be paid to the upgrading of the enforcing agencies (police and customs, borders guards) in terms of staffing, equipment and training. **Conclusion** Slovenia has made an impressive effort in the adoption of new legal instruments. This legislative progress has been complemented *by the creation of new structures in the field of immigration and asylum and by the allocation of some budgetary resources for immigrants' accommodation, border policing, recruitment and training of judges. An improvement of the judiciary in the area of penal cases has been registered.*
2000	Significant progress has been made since the last Regular Report in the Justice and Home Affairs sector on policy development, harmonisation of legislation and strengthening of the administration. Progress has been made especially in the adoption of legislation for control of illicit drugs. However, full implementation of the *acquis* will require a further sustained effort. As concerns **visa policy**, the harmonisation of the Slovenian visa list was completed in 1999. The introduction of visa requirements for Bulgaria and Romania in line with the present *acquis* led to political problems. Therefore, arrangements were made for visafree travel for certain categories of people pending the adoption of a new EC Regulation on visa lists presently under discussion. A regulation concerning issuing of visas for foreign nationals intending to work in Slovenia was adopted in February but repealed in March 2000 following criticism about over-restrictive provisions. The electronic system for issuing visas is being installed and is working in eight diplomatic and consular representative offices. Instructions on issuing visas by diplomatic missions and consular posts have been prepared and are being applied, with the exception of those provisions which will be applicable only after accession. New stickers for visas and residence permits harmonised with the *acquis* and international standards came into use in June 2000. A Law on passports for Slovenian citizens was adopted in July. It regulates the passport issuing procedures, monitoring and sanctions against violations. New passports are due to be issued at the beginning of 2001; they will contain more elements for protection against fraud. There has been no progress in resolving the question of the sea and land border with Croatia in Piran Bay and in South Eastern Slovenia. As far as **migration** is concerned, the Law on Foreigners covers the entry and residence of foreign nationals in Slovenia. Implementation of the law was identified as a shortterm priority in the Accession Partnership, and it has been partly fulfilled. Part of the implementing legislation has been adopted – for instance concerning issuing of visas and residence permits. *Overall assessment* The overall situation and level of alignment in the Justice and Home Affairs area is in general good, with the exception of border control, on which further efforts are still needed Slovenian **visa policy** is close to alignment – however, Slovenia still has to align its legislation as far as airport transit visas are concerned.
2001	Slovenia has made some progress since the last Regular Report on Justice and Home Affairs, both in terms of the harmonisation of legislation and strengthening of the administration. Concerning **visa policy**, instructions on issuing of visas at border crossings, (including refusal of entry for foreign nationals), on issuing of

	visas on humanitarian grounds and on revoking a visas were introduced in January 2001. A list of countries whose citizens need airport transit visas when transiting through Slovenian airports was adopted in July 2001. New Slovenian passports were issued in March 2001 on the basis of the Law on passports for Slovenian citizens adopted last year. The introduction of the electronic information system (Vision) continued. The Slovenian and Croatian Governments agreed in July 2001 on the demarcation of the outstanding parts of the sea and land border. Once the agreement is ratified by both Parliaments, Slovenia's last remaining border issue with its neighbours will have been settled. The border co-operation agreement with Croatia, which had been awaiting ratification since 1997, was ratified by Slovenia in July 2001. In May 2001, the Government adopted a **Schengen** Action Plan identifying the needs for the period 2000 – 2005 for further recruitment of staff to ensure adequate control of the future EU external border, and for training and purchase of equipment. *Overall assessment* The overall situation and level of alignment in the Justice and Home Affairs area is good although establishing adequate border controls especially at the future EU external border as well as implementation of the Asylum Act will require a further sustained effort. Slovenian **visa policy** is close to alignment. The only outstanding question is the visa policy on Romania. However, the Government decided last year that Slovenia will follow the visa policy of the EU on Romania.
2002	Since the 2001 Regular Report, further progress has been made in Slovenia in the fields of data protection, migration, asylum, police co-operation, and the fight against organized crime. However, little progress can be reported in the area of drugs. Slovenia and Bulgaria signed an agreement in November 2001 on abolition of visas and co-operation in a number of areas (*see below*). The installation of the on-line system for issuing visas has continued and now over half of the Slovenian missions abroad are covered. Slovenia's **visa policy** is in line with that of the EU. *Overall assessment* Slovenian visa policy is fully aligned with that of the EU now that Romanian nationals no longer need a visa to enter the territory of the EU Member States. *Conclusion* Negotiations in this chapter have been provisionally closed. Slovenia has not requested any transitional arrangements in this field. Slovenia is generally meeting the commitments it has made in the accession negotiations in this area.
2003	Slovenian **visa policy** is fully aligned with that of the EU. As regards implementation and administrative capacity, the on-line system for visas has been introduced in almost all Slovenian missions abroad.

ANNEX 8.1 TO CHAPTER 8: MAIN ELEMENTS OF THE COMMISSION PROPOSAL FOR A LOCAL BORDER TRAFFIC REGULATION OF 2005

1. Purpose. The purpose of the proposal was to lay down common rules on the criteria and conditions for establishing a regime of local border traffic at the "external land borders" of the Member States.
2. Geographical scope. For the purposes of the proposal, these land borders are defined in such a way as to accommodate the three stages of Schengen integration in the newly acceding states. Thus, land borders are considered:
   (a) as the borders between a Member State and a neighbouring third country (e.g. Poland and Ukraine);
   (b) as Member States fully implementing the Schengen *acquis* and as Member States bound to apply this *acquis* in full but for which the Council decision authorizing it to fully apply that *acquis* should not have entered into force (e.g. Germany and Poland 2004-2007); and
   (c) two Member States bound to apply the Schengen *acquis* in full, but for which the Council decision authorizing them to fully apply that *acquis* had not entered into force (Poland and Slovakia 2004-2007).
3. Personal scope. The proposal covered only third-country nationals lawfully residing in the border area in a neighbouring country for at least one year ("border residents"). EU citizens and third-country nationals enjoying the community right to free movement are excluded from the application but in cases where the facilitation of border crossing goes beyond this right, the scope can be extended to cover them.
4. Border crossing facilitation. The proposal defines the specific conditions and documents required to cross the border for the purpose of local border traffic.
5. Visa. As regards border residents subject to the visa obligation, a special visa (type L) is proposed. This was envisaged to be a multiple-entry visa issued for at least one year and for a maximum five years, entitling the holder to stay in the border area of the issuing Member State for seven consecutive days maximum and without exceeding a maximum of three months within any half-year period. Such visas would be issued following the provisions of the Common Consular Instructions for the Member States fully implementing the Schengen *acquis* and following their national legislation, for those who are not yet implementing it fully.

6. Implementation. As with the adoption of the proposed Regulation setting out the Community regime on local border traffic, the external competence on this matter would have been conferred on the Community. The Commission proposed that the actual implementation be delegated to the Member States and conducted through bilateral agreements. However, such agreements have to comply with and do not affect the provisions established by this Regulation.
7. Reciprocity. At least equivalent treatment should be granted by the neighbouring countries to EU citizens or third country nationals resident in the border area of a Member State who wish to cross the border of a neighbouring third country and stay within its border area for the purpose of local border traffic.

Based on a Proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, COM (2005) 56 final, Brussels, 23 February 2005.

ANNEX 8.2 TO CHAPTER 8: MAIN PROVISIONS OF SOME LOCAL BORDER TRAFFIC AGREEMENTS CONCLUDED BY THE MEMBER STATES ON THE BASIS OF THE LOCAL BORDER TRAFFIC REGULATION

Hungary-Ukraine Agreement. The Hungarian-Ukrainian agreement of 19 September 2007 seems to be the first bilateral local border traffic agreement signed following the entry into force of the Local Border Traffic Regulation. It follows the tradition of agreements signed in the past between Hungary and the USSR. The first agreement on the facilitation of state border crossing for citizens residing in border administrative units was signed on 1 August 1985, and was later replaced by the Agreement on facilitated state border crossing regime for the citizens residing in border areas, signed between Hungary and Ukraine on 26 February 1993. However, on 1 August 2003, all previous agreements had to be denounced as part of the process of accession to the EU.

The main elements of the Hungarian-Ukrainian agreement are as follows:

- Scope. The information on the exact territorial scope of the agreement is contradictory. According to Ukrainian authors[1] the border area is defined as being 50 km, similar to the Slovak-Ukrainian agreement but in contrast to the Polish- Ukrainian agreement. Others [2] state that the agreement uses a 30 km reference to define a border area, but then in the annexes where the exact administrative regions to which the agreement applies are enumerated, the list includes Ukrainian and Hungarian municipalities actually located within a 50 km distance from the border. The total number of municipalities to which the agreement applies is 384 on the Ukrainian side and 244 on the Hungarian side of the border. Based on this, Ukrainian estimates show that access to the local border traffic scheme would affect approximately 600 000 to 750 000 Ukrainian citizens resident in the Transcarpathian region of Ukraine.
- Duration of stay. The local border traffic permit entitles its holder to a multiple entry and stay for a maximum of 90 days in any six month period. Thus, the allowed stay in terms of duration is equal to the one granted on the basis of a Schengen visa but the territory to which

[1] MITRYAYEVA, "Schengen border: A view from Transcarpathia", Європейський простір - портал проєвропейського громадянського суспільства України, [European space - portal of the pro-European civil society of Ukraine], 7 April 2009, available at:
http://eu.prostir.ua/view/233916.html?print.

[2] LASTOFKA, op. cit.

it applies is different. The holders of the local border traffic permit are entitled to a stay in the border area as defined by the agreement, while the Schengen visa entitles its holder to access to the entire Schengen territory. The permit is issued by the consular authorities of the state of entry.

- Grounds for obtaining the permit. The minimum period of permanent residence in the border area which can entitle a citizen to apply to the local border traffic permit is 3 years. The fact of residence is proven by national passport, Ukrainian travel passport or registration certificate of the place of residence.

- Duration of the permit. The permit is issued for a minimum of one year and a maximum of five years. Its cost is set at €20 and is thus slightly lower than the cost of a short-stay Schengen visa, which in the case of Ukrainian citizens is set at €35. In this agreement, like the Slovak-Ukrainian one, there is a maximum period in which the permit has to be issued; 30 days from reception of the application.

- Sanctions. To ensure compliance with the rules of the agreement and especially with the geographical limitations of the permit, the sanctions foreseen include deportation/expulsion from Hungary for a period up to five years.[3]

Slovakia-Ukraine Agreement. The agreement between Slovakia and Ukraine has similar provisions along the lines of the requirements of the Local Border Traffic Regulation but with some differences. In this case, the agreement covers an area within 50 km of the common national border. Apparently, in this case the proposal did not meet with objections from the Commission. With such a border area definition, the residents of 295 municipalities of Zakarpattya oblast of Ukraine, or about 400 000 people and 299 municipalities in Slovakia, will fall under the agreement.

Other elements of the agreement include:

- Duration of stay. Based on the simplified border crossing permit, the residents of the border areas will have the right to stay in the border area of the neighbouring state for up to 30 days from the date of entry. However, the requirement applicable to short-stay visas also applies here, namely that the total stay may not exceed 90 days in any period of 180 days.

- Grounds for obtaining the permit. The requirement making the residents eligible for issuing of the permit is a three-year period of permanent residence (while in the case of Poland only

[3] MITRYAYEVA, op. cit.

one year of residence is required) in the municipalities covered by the border area. Family members who do not meet this criterion will also be entitled to obtain the permit. The fact of residence will be certified by a Ukrainian passport and a certificate issued by the competent Ukrainian authorities.

- Duration of the permit. The permit will be long-term, issued for a period of at least one year and for maximum of five years. The document will be issued by the consulates of the country of entry and there is a maximum period for the completion of this administrative operation (within 60 days of the date of application). When issuing the permit, the authorities will also take into account whether the applicant is a bona fide traveller or not.
- Sanctions. Sanctions in the form of prohibition of entry and expulsion are provided for if a traveller breaches the rules of local border traffic.[4]

Poland-Ukraine Agreement. The Polish-Ukrainian agreement was signed in March 2008 and covers a 30 km zone from the border with select municipalities up to 50 km from the border also covered by the scheme. Originally, Poland requested a 50 km zone but after objections from the European Commission, the general rule was set at 30 km from the border with a few exceptions for municipalities in the 50 km zone.[5] According to the Polish Ministry of Foreign Affairs at the time of signing, the agreement was meant to cover a zone encompassing 1822 towns and villages on the Polish side from two administrative units (ca. 800 000 residents), while on the Ukrainian side 1545 towns and villages from three regions are covered (ca. 1.5 million residents).[6] The required period of residence in the border area for the issuing of the border permit is one year. According to the Polish Foreign Ministry, the country is ready to issue 300 000 to 500 000 local border permits. The intention to establish a local border traffic regime for the largest possible area clearly shows Poland's commitment to facilitating cross-border cultural, economic and social contacts, especially considering the fact that since Poland joined the Schengen area on 21 December 2007, Ukrainian citizens are no longer able to apply for multiple entry and free of charge visas but instead have to apply for a

[4] Cross-Border Cooperation/Söderköping Process, "Ukraine, Slovak republic sign local border traffic agreement", 30 May 2008, available at http://soderkoping.org.ua/page18829.html.

[5] "Poland eases border crossing for Ukrainians", *Kyiv Post*, 06 March 2008, available at http://www.kyivpost.com/world/36924, accessed in June 2009.

[6] Polish Ministry of Foreign Affairs, "Communiqué on the initialling of the Agreement on the rules of local border traffic between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine", 03 March 2008, available at http://www.msz.gov.pl.

Schengen visa at the cost of €35 for single entry.[7] In some cases this can represent a monthly wage or pension.

Other Member States. Several Member States, mainly or exclusively new ones on the Eastern land border of the EU, have declared an interest in the conclusion of a bilateral local border traffic agreement, e.g. Bulgaria with Macedonia and Serbia, and Romania with Moldova and Ukraine.

The Bulgarian Council of Ministers approved the draft agreement with Macedonia on local border traffic on 21 May 2009, as negotiation guidelines for the Minister of the Interior who is to sign the agreement, subject to subsequent ratification. The scheme will be open to citizens of both countries who have been resident in the border areas for at least two years, as well as family members. The other provisions are standard: 30km border area but extendable to 50km if such are the borders of the administrative units in the country concerned. The local border traffic permit issued is valid for a period of one to five years and allows a stay of 90 days in any 180 day period.[8] A local border traffic agreement was also discussed with Serbia.[9]

As of mid-2009 Romania was also negotiating an agreement with Ukraine[10] and with Moldova.[11]

Lithuania is also negotiating an agreement with Russia which will cover the border between the Kaliningrad region and Lithuania. The border zone under negotiation is 30 to 50km, which will cover a significant part of the territory of the Kaliningrad region.[12]

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[7] LASTOFKA, "The proliferation and evolution of visa regimes on the Eastern borders of the European Union", *Challenge Working Paper*, WP 7, May, (2009).

[8] "Bulgaria introduces local border traffic regime with Macedonia", *Europe.bg*, 21 May 2009, available at http://www.europe.bg/htmls/page.php?category=5&id=21770 (in Bulgarian).

[9] "A unique visa agreement is under preparation with Serbia", *News.bg*, 01 October 2008, available at http://news.ibox.bg/material/id_47388049.

[10] "Ukraine-Romania talks on coordination of draft bilateral agreement on local border traffic took place in Bucharest", *Ukrainian National Radio*, 16 February 2009, available at http://www.nrcu.goc.ua.

[11] AVRAM AND MÜLLER, "Moldova's Border with Romania: challenges and perspectives after Romania's accession to the European Union", *South-East Europe Review*, 3/2008, (2008), pp. 399-429.

[12] According to information from the Permanent Representation of Lithuania to the EU; see also Ministry of Foreign Affairs of Lithuania, 15 May 2009: Lithuania and Russia consult about ways to intensify mutual relations, available at http://diplomacymonitor.com/stu/dma1.nsf/uh/ccD0FC0E98095772C4852575B80039500C, for information on the Lithuanian-Russian Intergovernmental Commission meeting of 14 May 2009.

Hungary's negotiations with Serbia on such an agreement failed. It was meant to facilitate the movement to Hungary of 250 000 ethnic Hungarians living in the Serbian province of Vojvodina. The failure of the negotiations is attributed to a certain extent to the fears of the same ethnic Hungarians about the dissolution of their ethnic homogeneity through Serbians moving to the border areas to benefit from the agreement. They also feared differential treatment of the ethnic Hungarians, only 60% of whom live in the proposed 50km border area. Ultimately, they were opposed to any measure that offered only temporary or specific solutions, while the main demand towards Hungary - that of dual citizenship was not considered.[13]

[13] TERNOVÁCZ, "Vajdaság: Miért nem kell kishatárforgalmi megállapodás", 20/10/2007, *Magyarország.ma*, 20 October 2007, available at http://www.magyarorszag.ma/modules.php?name=News&file=article&sid=8385, accessed in April 2009, cited in LASTOFKA, op. cit.

ANNEX.8.3 TO CHAPTER 8: CATEGORIES OF PERSONS BENEFITING FROM A WAIVING OF THE VISA FEE BASED ON VISA FACILITATION AGREEMENTS

Category	Russia	Ukraine	Moldova	Western Balkans
Members of official delegations, participating in meetings, consultations etc.	**X**	**x**	**X**	**x**
Members of professions participating in international exhibitions, conferences, seminars			**X**	**x**
Drivers conducting international cargo and passenger transportation services		**x**	**X**	**x**
Members of train, refrigerator and locomotive crews in international trains		**x**	**X**	**x**
Journalists		**x**	**X**	**x**
Persons participating in scientific, cultural and artistic activities including university and other exchange programmes	**X**	**x**	**X**	**x**
Pupils, students, post-graduate students and accompanying teachers	**x**	**x**	**X**	**x**
Participants in international sport events and persons accompanying them in a professional capacity		**x**	**x**	**x**
Participants in youth international sports events	**X**			
Participants in official exchange programmes organized by twin cities and other localities	**X**	**x**	**X**	**x**
FoClose relatives (spouse, children, parents, grandparents and grandchildren)	**X**	**x**	**X**	**x**
Representatives of civil society organisations when undertaking trips for the purposes of educational training, seminars, conferences				**x**
Members of national and regional Governments and Parliaments, Constitutional Court and Supreme Court	**X**	**x**	**X**	
Disabled persons and the person accompanying them, if necessary	**x**	**x**	**X**	**x**
Persons having presented documents proving the necessity of their travel on humanitarian grounds including medical purposes	**X**	**x**	**X**	**x**
Children under the age of 18 and dependent children under the age of 21		**x**		
Pensioners		**x**	**X**	**x**
Representatives of religious communities				**x**
Children under the age of 6				**x**
Mayors and members of the municipal councils				**Only Macedonia**
Persons politically persecuted during the communist regime				**Only Albania**

ANNEX 10.1: BULGARIA AND ROMANIA: CRITERIA FOR VISA FREE TRAVEL

This annex reviews the details of the analysis that led the Commission to recommend that the two countries be taken off the black visa list. Particular attention will be paid to a special legal measure these two countries enacted which restricted the freedom to travel of their own citizens. At the time it appeared that such a measure might become a condition for other countries as well. But this did not happen. The Balkan countries which were taken of the visa black list in 2009 did not enact similar measures.

A 1.1 Key issues in the case of Bulgaria

The Commission's 2001 report on Bulgaria consists of three main sections:[14]

1) the legal framework and administrative practices at Bulgarian borders, including visa policy – whether the Bulgarian visa list corresponds to that of the Union, border surveillance, carrier sanctions, sanctions for illegal migration to the member states and sanctions on facilitators of illegal migration to the member states;
2) repatriation of Bulgarian nationals to Bulgaria – whether member states are having trouble repatriating Bulgarians to Bulgaria;
3) additional measures such as technical equipment at borders and cooperation with Greece, including tour operators.

Looking at the report on Bulgaria more closely, in Section 1, the Commission notes the following matters as relevant to the lifting of the visa requirements:

- Bulgaria has introduced new passports that meet the requirements of the EU regarding safety measures against forgery.
- The facilities for issuing visas at the border have been abolished; criminal sanctions and fines for irregular border crossings and forged documents have been set.
- Concerning sanctions on illegal emigration to the member states, Bulgaria has introduced legislation making it a criminal offence in Bulgaria to commit an offence

[14] See the Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt of that requirement COM(2001) 61 final, 02 February 2001.

against the immigration law of any member state, over which immigration laws the Bulgarian government has no control.

- Sanctions have been established on the facilitation of illegal immigration/emigration.
- Bulgaria is aligning its visa policy to that of the EU – it is in the process of introducing visa requirements for Georgians, Russians, Ukrainians and Tunisians. For the moment it is only seeking to maintain a visa-free regime with the Federal Republic of Yugoslavia and Macedonia;
- Staffing and equipment at Bulgarian borders have been provided.

Under Section 2 of the report, repatriation of illegal residents to Bulgaria, the Commission notes as relevant to the decision whether to maintain or abolish visa requirements that Bulgaria has readmission agreements in force with ten member states and six other states; further readmission agreements are in the process of being concluded. Additional readmission agreements are also being negotiated with many other countries.

In Section 3, additional measures to be taken by Bulgaria are set out. These include more computerized control systems at border posts, an action plan with Greece, more legislation on carriers' sanctions to provide for penalties on carriers who take persons out of Bulgaria who do not have the necessary documents to enter wherever they are going. Here again is an example of cross-recognition.

Finally, in Section 4 there is a description of an information campaign to Bulgarian citizens advising them of the limits of their new visa-free travel right. An oblique passage refers to working contacts between Bulgarian authorities, the tour operators association and the consulates of the Member States. In the context of local consular cooperation, consular officials exchange information about the reliability of tour operators as visa intermediaries.

As far as reciprocity is concerned, in March 1997 Bulgaria had already unilaterally lifted the visa requirement for EU nationals entering Bulgaria for short stays.

A 1.2 Key issues in the case of Romania

The interim Romania report[15] has the following headings:

1) border controls, including institution building, investment in technology, legal provisions, visa policy and others;
2) travel document safety;
3) migration policy;
4) Romanian citizenship;
5) carriers' liability, expulsion of aliens, readmission agreements, repatriation to Romania;
6) conclusions.

The interim report notes with approval that a unified border police has been established along with a long-term programme of professionalization and demilitarization of the border police. Further, the substantial investment in technical equipment mainly focused on Southern Ukraine and Moldova are noted. Under the heading "legal provisions and statistics related to border crossing", over the period 1998-2000, 10,524 foreign nationals were forbidden from leaving Romania. 2,333 of these had an onward destination to an EU state. The majority were nationals of Afghanistan, Iraq, Iran, Pakistan, Turkey and China. The reason for preventing their departure was primarily irregularity in their travel documents. Over the same period, 27,407 Romanian nationals were forbidden from leaving Romania. Criminal investigations, false documents, persons hidden in vehicles and travel document irregularities were the reasons given in 7,356 cases. Thus 20,000 Romanians were prohibited from leaving their country without reference to a particular legal provision. As will be demonstrated later in this study, they might have been part of those who have fallen victim to some preventive administrative measures aimed at decreasing the emigration of Romanian citizens.

In the second section, the report considers Romania's visa policy. The report states:

> 86 countries which have a visa obligation for their citizens and whose nationals display high migration tendencies are subject to a restrictive visa regime, the entry to Romanian territory being granted only if the citizens from these countries have a certified invitation

[15] See Commission of the European Communities, Report from the Commission to the Council: Exemption of Romanian citizens from visa requirements, COM (2001) 361 final, 29 June 2001; see also the Intermediate report on visa issues (Romania), COM (2001) 0061 final, 2 February 2001.

> and a bank guarantee at the disposal of the Romanian authorities to be used in case of repatriation. Visas are issued only after the authenticity of the invitations is confirmed.

These documentary requirements, including bank guarantees at the disposal of the government, go far beyond anything contained in the Schengen Common Consular Instruction.

The report also notes the arrangement between Romania and Moldova that their citizens may pass the mutual border on presentation of an identity card. The report expresses satisfaction that this regime is being phased out, firstly at the fact that Moldavian citizens will require passports to enter Romania by 1 July 2001. Subsequently, the Commission expects Romania to apply visa requirements to Moldavians. The other countries whose nationals do not require visas to enter Romania, but are subject to such an obligation in the EU are: Bosnians, Yugoslavs, Macedonians, Turks, Russians and Ukrainians.

The report continues: safety measures in procedures have been reconsidered; the manufacture of Romanian passports meets with approval in the report – the mechanisms are sufficiently advanced to meet the EU's requirements. The legal provisions for issuing passports and identity documents is reviewed, as well as the way in which blank documents are stored and stolen documents accounted for.

The lack of legal measures is the subject of negative comment in the report. In particular it notes that there were 6,960 asylum applications submitted in the EU and North America by Romanian nationals in 2000. This figure is produced in the context of a lax exit policy rather than in the context of concern about human rights protection in Romania. The legal possibility for Romanian nationals to renounce their citizenship is considered. The report points out that in a number of EU states Romanians have renounced their citizenship (certified by the Consulate) and thus made themselves irremovable. The Commission's report expresses some satisfaction with the answers provided by the Romanian authorities (i.e. that there is no power to consulates to give such certificates) but it is apparent that further efforts are expected. Carriers' sanctions only apply as regards persons being brought to Romania without correct travel documents. However, the Commission does not explicitly criticize the fact that legislation is lacking, making it an offence for carriers to take people out of Romania without the travel documents required at the destination.

The report notes the strengthening of legal provisions for the expulsion of irregular foreigners and for their detention pending expulsion. The report provides statistics about numbers of irregulars, a subject on which reputable experts are very reticent. It states:

> it is estimated that around 40,000 aliens cross the [Romanian] border illegally with the purpose of reaching the EU; according to the Romanian authorities, 20,000-30,000 aliens are temporarily staying in Romania waiting for an opportunity to move westwards. Most of the illegal immigrants come from Asia and Africa.

The final report on Romania is substantially longer and more structured than the interim one but overall it is structured along the same lines as the interim report[16] and also provides a systematic review of each theme in three parts: legal provisions, institution building, technical equipment and investment programmes and commitments.

A 2) Bulgaria and Romania: examples of a road map to visa-free travel?

This brief review of the reports on Bulgaria and Romania clarifies the list of measures identified as essential by the Commission for removal from the visa black list: security of passports, readmission agreements and reciprocity. However, in their attempt to meet all EU requirements, both countries went way beyond the criteria identified by the Commission, while at the same time the evaluation of important aspects, such as crime, did not appear prominently in the reports. Nevertheless, the issue of border controls, although not forming part of one of the criteria for visa exemption, occupies an important place in both reports.

In general, all the reports seem focused on controlling immigration, both into Bulgaria and Romania and from those two countries into the European Union. Looking at the reports from this perspective explains the prominent place of border controls, as they are deemed essential in reducing both the number of immigrants and emigrants for the two countries. Bulgaria and Romania were put in a position to prove that they can curb illegal emigration originating from their territory. However, this, as mentioned earlier, cannot be achieved easily in a democratic society, where the individual benefits from a number of rights. Faced with such an objective,

[16] The report contains four main parts: (1) Romania as a transit country for third country nationals (border controls carried out by Romanian authorities on entry, transit and exit; Romanian visa policy; Romanian travel documents and identity documents; Romanian legislation and asylum); (2) Illegal emigration of Romanian nationals to the Member States (border controls carried out by Romanian authorities on Romanian citizens leaving the country; law and other rules on Romanian citizenship and stateless persons; economic and social dimension); (3) Repatriation of third country nationals and Romanian nationals illegally residing in Member States (readmission agreements concluded by Romania; building a network of liaison officers; cooperation with airlines companies; commitments); (4) Conclusion and Recommendations.

both countries adopted a new legal tool which was questionable from a human rights perspective.

A 3) A new legal tool: administrative measures on travel

This legal tool essentially consisted of the confiscation of passports (combined with a travel ban) on citizens who had infringed the residency or immigration laws of other countries. This is explicitly referred to by the Commission. For example, the report on Bulgaria notes two elements that were key for the decision to remove the country from the black list: the introduction of (1) new, more modern identity documents and (2) sanctions on illegal immigration to the member states. This second element will now be considered in detail, in parallel for both Bulgaria and Romania.[17]

Three details will be considered separately:
i) Legal basis
ii) Form of restriction and duration
iii) Reasons for imposing the measure

This brief examination of the legal details is then followed by a brief discussion of post-accession developments.

i) Legal basis

In the case of Bulgaria all rules can be found in one act, the Law on the Bulgarian Identification Documents (LBID) first adopted in 1998 and frequently amended thereafter.

In the Romanian case, the administrative measure was not contained in one act but regulated by several on a different level – government ordinances and laws.

ii) Form of restriction and duration

[17] An in-depth analysis of both cases can be found in TCHORBADJIYSKA, "The constitutional price of visa free travel: the cases of Bulgaria and Romania", (2009), for the measures applied in Bulgaria and an analysis of the case law of the Supreme Administrative Court in Bulgaria see, TCHORBADJIYSKA, "EU Migration Phobia and Citizens Rights' in the Candidate Countries", *European Journal of Migration and Law*, vol. 8, n. 2, (2006), pp. 143-162(20).

The preventive measure foreseen in the Bulgarian Article 76 LBID can take two forms: a ban on leaving the country and a refusal to issue passports, which can be imposed independently or can be cumulated. The ban is general; it forbids the Bulgarian citizen from leaving the country and thus from visiting not only the country whose legislation they have breached but also any other country. The measure is valid for a period of two years.

In the case of Romania, the limitation appears to be cumulative – prohibition to leave the country and withdrawal (or what the Commission calls in its report – temporary suspension) of passports. However, the travel ban is valid only for travel to the country where the reason for the measure arose.

The original duration of the ban in the provisions of 1998 was 3 to 12 months but was extended following an amendment of 2002 to a period of 1 to 5 years. This extension was one of the commitments that the Romanian government took prior to the Commission Report of 2001.[18] But it was later shortened to three years.

iii) Grounds for imposing the measure

Bulgaria. The text of LBID mentions two reasons for the imposition of the measure. The text of the law is self-explanatory; Article 76 reads:

> May not be permitted to leave the country, passport and substituting documents to be issued of:[19]
>
> …
>
> 5. persons who, during their stay in another country, have committed offences against its legislation – two years from the receipt of an official letter from the Ministry of Foreign Affairs or the documents for compulsory removal or expulsion, pointing out the committed offence, by the competent bodies of the respective country;
>
> 6. persons who are removed or expelled from another country for violation of the entry and residence regime – for a period of two years from the receipt of an official letter from the Ministry of Foreign Affairs for the committed offence or from the date of receipt by the competent authorities of the documents for the compulsory removal or expulsion.

[18] The Report clearly states that "in order to combat illegal immigration of Romanian nationals to EU countries, the Romanian authorities intend to increase the penalties (e.g. extending the period of suspension of the passport) to be inflicted on nationals illegally emigrating to the EU Member States and returned on the basis of readmission agreements".

[19] Before 1 January 2007, the text continued with "and the issued to be withdrawn" (meaning those documents which were already issued).

Romania.

In Romania the key element is the return based on the readmission agreements signed between Romania and third states.[20] The fact of readmission is sufficient regardless of its causes. Moreover, according to the Commission Report of 2001, this measure of withdrawal or temporary suspension of a passport is automatically used in the case of repatriation of Romanian citizens expelled from a foreign country. The same is applicable to Romanians who commit offences or other law breaches abroad, if the Romanian authorities are informed of it.

A 4) Developments post-accession

It was generally assumed that accession to the EU would put an end to these administrative measures limiting the right to travel abroad, at least as far as the expulsions from other EU countries are concerned.[21] Withdrawing a passport does not make sense when the citizens of Bulgaria and Romania can travel within the EU only with an identity card. Moreover, the grounds on which other Member States can refuse the benefits of free movement to citizens from other Member States are strictly limited. However, the acts in force were not repealed but only slightly amended. What could their impact be after accession?

Until accession to Schengen, the border controls between Bulgaria and Romania and the rest of the EU states remain. However, travel (at least within Europe) requires only an identity card.[22] The sanctions envisaged under both the Bulgarian and the Romanian law do not only include refusal to issue a passport (or withdrawal of already issued ones) but also a ban on leaving the country. The ban in practice means that the name of the person concerned is included in a national database, and whenever s/he appears at border checkpoint, may be refused to leave the country. Hence, the measures should still have an effect after accession, but before the abolition of border controls.

The situation will naturally change upon accession to the Schengen area. Without border controls, a ban on leaving the country can no longer be implemented. Thus the preventive measure discussed here will be devoid of purpose; at least as far as the Schengen states are

[20] Article 38 (a) of Law n. 248 of 20 July 2005.
[21] Expulsions from the EU Member States account for about 50% of all returned from Romania and more than 2/3 of those returned to Bulgaria.
[22] And the cases when an identity card might be withdrawn under Bulgarian law are strictly limited to cases of detention and imprisonment.

concerned. For all other states, the possibility to impede departure from the country will remain.

Of course, even after accession to the EU and later to Schengen, it will still be possible for Bulgarian and Romanian citizens to be returned on the grounds that they are illegally present on the territory of another Member State. This can happen in cases when they have overstayed their allowed stay and, for one reason or another, are not covered by the provisions on the free movement of persons. What the exact limits of the provisions are will be for the European Court of Justice to decide.

In the meantime, the ECJ has already had the occasion to look at the compatibility of Romanian provisions with European law. In the case C-33/07 a Romanian Court asked questions about the compatibility of the provisions of Romanian legislation with the principle of free movement of persons guaranteed by Article 18 EC. Of particular relevance is the first question on whether Articles 38 and 39 of Law 248/2005 (discussed above) which prevent persons (who are Romanian citizens and now citizen of the Union) from moving freely in another State (in this case, a Member State of the European Union), constitute an obstacle to the free movement of persons upheld by Article 18 EC. This question is linked to that of whether a Member State of the European Union (in this case Romania) places a limitation on the exercise of the right of free movement of citizens within the territory of another Member State.

The answer of the European Court of Justice in Case C-33/07 *Jipa* is the following:

> A national of a Member State who has been repatriated from another Member State enjoys the status of a citizen of the Union under Article 17(1) EC and may therefore rely on the right pertaining to that status, including against his Member state of origin, and in particular the right conferred by Article 18 EC to move and reside freely within the territory of the Member States. In that regard, the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin. The fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State.[23]

The ECJ judgment thus provides some clarity as to the compatibility of the administrative measures that are in issue here with the free movement provisions of European law. However,

[23] Case C-33/07, *Jipa*, Judgment of 10 July 2008, para 17-18.

the Court seems to hedge its position by saying only restrictive measures “without valid justification” would be contrary to the principle of freedom of movement within the EU. Unfortunately no further guidance was given as to what would constitute a valid justification.

However, this judgment could not answer the question of whether these provisions were compatible with the national constitutions (of Bulgaria and Romania, respectively). The question remains open because, somewhat surprisingly, no case has been brought to the constitutional courts of these countries.